# MISSISSIPPI LAW JOURNAL

PRIVATE LITIGATION UNDER THE WAGE AND HOUR ACT
*Rufus G. Poole*

CONTROL OVER DISTRIBUTION: MONOPLY ASPECTS OF RESTRAINTS UPON DISTRIBUTORS AND PRODUCERS
*George E. Hale*

THE LIABILITY IN TORT OF COOPERATIVE POWER COMPANIES
*William N. Ethridge, Jr.*

January, 1942

VOLUME XIV NUMBER 2

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Of MISSISSIPPI LAW JOURNAL, published 5 times annually at University, Mississippi, for January, 1942.

State of Mississippi }
County of Lafayette } ss.

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Lafayette County, Mississippi.
Chancery Court Clerk
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Mississippi Law Journal

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# PRIVATE LITIGATION UNDER THE WAGE AND HOUR ACT*

*Rufus G. Poole*†

The Fair Labor Standards Act[1] provides three separate types of sanctions. The Administrator may sue for an injunction to restrain future violations, or the Government may prosecute criminally for willful violations, or the individual employee, affected by a violation of minimum wage or overtime provisions of the Act, may institute an action for damages. It is the third of these types—the suit by the individual employee—with which this discussion is concerned. These actions are based upon Section 16(b) of the Act, which provides as follows:

> "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

## *Employer-Employee Relationship*

The first question to arise in an employee suit under this section is whether an employer-employee relationship exists between the parties. In defining the terms "employer," "employee," and "employ," Congress has used very broad language. Employer "includes any person acting directly or indirectly in the interest of an employer in relation to an employee," and employ "includes to suffer or permit to work." Obviously, this concept of the employer-employee relationship goes far be-

*Statements of opinion expressed herein are those of the writer and not necessarily those of the United States Department of Labor.

†Assistant Solicitor, in Charge of Opinions and Review, United States Department of Labor.

[1]52 STAT. 1060 (1938), 29 U. S. C. A. §§ 201-219 (Supp. 1940).

yond common law principles of master and servant. Therefore, the courts have not hesitated to strike down or to delve beneath the various evasive devices, such as independent contractors, cooperatives, home workers, student-teacher, etc., which some employers have sought to utilize as a means of escaping the employer-employee relationship. In *Bowman v. The Pace Co.*,[2] a case involving a *bona fide* independent-contractor relationship, the Fifth Circuit Court of Appeals served notice:

> "If . . . [the defendant], in order to evade the Act, colluded with . . . [a third party] to interpose him as an apparent independent contractor, we would hold him the agent of . . . [the defendant] to hire and pay . . . [the plaintiff], so that . . . [the plaintiff] would be the employee of . . . [the defendant]."

And in the recent case *Fleming v. Palmer*[3] the court declared illegal a so-called cooperative formed for the purpose of evading the requirements of the Act.

The recent amendment to Sections 5 and 6 of the Act, authorizing the Administrator to appoint an industry committee for Puerto Rico and containing specific reference to the employment of home workers, made it abundantly clear that the existence of an employer-employee relationship under the Act is not dependent upon the place where the worker is suffered or permitted to work. And the clear inference from the First Circuit's opinion in the *Palmer* case confirms this view.

It may be added also, that the employer-employee relationship exists even though the worker is a learner or apprentice or is handicapped. However, under Section 14 of the Act the Administrator is authorized to and has issued regulations, compliance with which will in many instances, relieve the employer from the obligation of paying these less productive employees the same rates paid to his more efficient workers.

*Court of Competent Jurisdiction*[4]

It is now well established that an employee action under Section 16(b) of the Act may be prosecuted in either the Federal District Courts[5]

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[2]119 F. (2d) 858, 860 (Fla. 1941).

[3]4 Wage Hour Rep. 654 (C. C. A. 1st, 1941).

[4]For a more detailed discussion of the basis of state and Federal court jurisdiction, see Crockett, *Jurisdiction of Employee Suits Under the Fair Labor Standards Act* (1941) 39 MICH. L. REV. 419.

[5]Robertson v. Argus Hosiery Mills, 121 F. (2d) 285 (C. C. A. 6th, 1941), *cert. denied*, U. S. Sup. Ct., Nov. 10, 1941. See also Hargrave v. Mid-Continent Petroleum Corp., 36 F. Supp. 233 (E. D. Okla. 1941); Martin v. Lain Oil & Gas Co., 36 F. Supp. 252 (E. D. Ill. 1941); Lefevers v. General Export Iron and Metal Co., 36 F. Supp. 838 (S. D. Tex. 1941); Missel v. Overnight Motor Trans. Co., 36 F. Supp. 980 (D. Md. 1941).

or in any state court[6] whose jurisdiction under the laws of the state is appropriate to the entertainment of such claims. The jurisdiction of the Federal District Courts is not dependent upon the sum or value in controversy or the citizenship of the parties, since the action is one arising under a law regulating interstate commerce.[7] Nor are such actions "suits for penalties and forfeitures incurred under the laws of the United States"[8] so as to be without the jurisdiction of state courts.[9]

*Removal from State to Federal Courts*

There have been five decisions by Federal District Courts[10] and one by a state court[11] on the question of removal of employee actions under Section 16(b) from state courts to Federal courts.[12] In *Ricciardi v.*

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[6]Campbell v. Superior Decalcominia Co., 31 F. Supp. 663 (N. D. Tex. 1940); Hargrave v. Mid-Continent Petroleum Corp., 36 F. Supp. 233 (E. D. Okla. 1941); Stewart v. Hickman, 36 F. Supp. 861 (W. D. Mo. 1941); Kuligowski v. Hart, 4 Wage Hour Rep. 203 (N. D. Ohio 1941); Floyd v. Dubois Soap Co., 4 Wage Hour Rep. 541 (1st App. Dist. Ohio, 1941); Forsyth v. Central Foundry Co., 240 Ala. 277, 198 So. 706 (1940); Hart v. Gregory, 218 N. C. 184, 10 S. E. (2d) 644 (1940); Emerson v. Mary Lincoln Candies, 17 N. Y. S. (2d) 851, 173 Misc. 531 (1940), *aff'd,* Court of Appeals, Nov. 25, 1941; Tapp v. Price-Bass Co., 147 S. W. (2d) 107 (Tenn. 1941); Stringer v. Griffin Grocery Co., 149 S. W. (2d) 158 (Tex. 1941).

[7]*See* Robertson v. Argus Hosiery Mills, 32 F. Supp. 19 (E. D. Tenn. 1940), 121 F. (2d) 285 (C. C. A. 6th, 1941), *cert. denied* U. S. Sup. Ct., Nov. 10, 1941, and other cases cited *supra* note 5. See also Crockett, *Jurisdiction of Employee Suits Under the Fair Labor Standards Act* (1941) 39 MICH. L. REV. 419.

[8]42 STAT. 635 (1922), 28 U. S. C. A. § 371 (1928).

[9]See Crockett, *op. cit. supra* note 7, at 422. Anderson v. Meacham, 62 Ga. App. 145, 8 S. E. (2d) 459, *cert. denied,* Ga. Sup. Ct., May 21, 1940, holding to the contrary, was followed by the same court in Adair v. Traco Division, 3 Wage Hour Rep. 563 (Ga. App. 1940). However, upon motion for rehearing the Adair opinion was withdrawn and the jurisdictional question certified to the Supreme Court of Georgia. *See* 3 Wage Hour Rep. 575. That court ruled in favor of jurisdiction of state courts in Adair v. Traco Division, 14 S. E. (2d) 466 (Ga. 1941). To the same effect is Robertson v. Argus Hosiery Mills, 121 F. (2d) 285 (C. C. A. 6th, 1941), *cert. denied,* U. S. Sup. Ct., Nov. 10, 1941. Compare, The Mengel Company v. Ishee, 4 So. (2d) 878 (Miss. 1941).

[10]Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (N. J. 1940); Wingate v. General Auto Part Co., 40 F. Supp. 364 (W. D. Mo. 1941); Kuligowski v. Hart, 4 Wage Hour Rep. 203 (N. D. Ohio 1941); Stewart v. Hickman, 4 Wage Hour Rep. 47 (W. D. Mo. 1941); Garrity v. Iowa-Nebraska Light & Power Co., No. 82, D. C. Neb., 1941. While the case of Hargrave v. Mid-Continent Petroleum Corp., 36 F. Supp. 233 (E. D. Okla. 1941) was removed from the state to the Federal Court no objection on this point was made by the plaintiff in the latter court, and the opinion merely holds that the state court from which the cause was removed was a court of competent jurisdiction and therefore defendant's motion to dismiss was denied.

[11]In The Mengel Co. v. Ishee, 4 So. (2d) 878 (Miss. 1941), the majority of the court was of the opinion that the jurisdiction of state and Federal courts in Section 16(b) actions was concurrent, and for this reason alone the petition for removal should have been granted by the lower court. But concurrent jurisdiction is not of itself sufficient ground for removal; the complaint must show on its face the existence of a "federal question." Gully v. First National Bank, 299 U. S. 109, 57 Sup. Ct. 96, 81 Fed. 70 (1936). This all important factor is not considered in the *Ishee* opinion.

[12]The Removal Act, 38 STAT. 278 (1914), 28 U. S. C. A. § 71, *et seq.* (1927), provides for the removal from a state to a Federal court of any civil suit "Arising

*Lazzara Baking Corp.*[13] the court, while rejecting plaintiff's contention that such actions were not subject to removal and stating that Section 16(b) could not be deemed to have qualified the Removal Act, granted the motion to remand, upon the ground that the petition for removal had not been filed within the prescribed time.[14] In *Stewart v. Hickman* [15] the motion to remand was granted, there being no diversity of citizenship and the court finding that no Federal question was involved since "the statute is plain and simple no construction or interpretation is called for."[16] The opinion of Judge Jones in *Kuligowski v. Hart*[17] is to the same effect. The complaint, filed in the state court, alleged that plaintiffs had not been paid overtime compensation as required by Section 7 of the Fair Labor Standards Act. The defendant removed the case to the Federal District Court upon the ground that it "arises under the . . . laws of the United States; . . . involves a substantial Federal question; and the sum in dispute exceeds the jurisdictional amount." On motion by the plaintiff to remand, the court held:

> "The case, as made in the plaintiff's petition, does not, as I see it, involve more than fact questions; does not present a Federal question calling for a construction of the Federal statute; nor is it a cause, the decision of which depends upon the construction of the Federal statute under which the action was brought. *Gulley, etc. v. First National Bank,* 299 U. S. 109, 114. . . . It would be a vain thing for Congress to provide that such action as this could be maintained in any court of competent jurisdiction, only to permit the action so commenced to be removed to the Federal Court. . . . Since all jurisdiction of the District Courts arises out of Congressional grant, so the Congress may modify or withdraw jurisdiction. To the extent that it has given the right to employees to maintain actions in other courts of competent jurisdiction, it seems reasonable to conclude that it intended to give the employee the choice of jurisdiction, not the employer."[18]

Some significance must be attached to the use of the word "maintained." If jurisdiction was to be given to the state courts only to have it divested by removal proceedings, some more restricted term such as

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under the . . . laws of the United States . . ., of which the district courts of the United States are given original jurisdiction. . . . Any other suit of a civil nature . . . of which the district courts of the United States are given jurisdiction . . ., may be removed . . ." if the defendant or defendants are nonresidents.

[13] 32 F. Supp. 956 (N. J. 1940).

[14] 36 STAT. 1095 (1911), 28 U. S. C. A. § 72 (1927).

[15] 4 Wage Hour Rep. 47 (W. D. Mo. 1941).

[16] Judge Reeves, while expressing the view that the Federal courts were without original jurisdiction where the amount involved did not exceed $3,000, found it "unnecessary" to decide that question.

[17] 4 Wage Hour Rep. 203 (N. D. Ohio 1941).

[18] *Ibid.*

"instituted," "filed," "commenced," "brought," or "may be had," might well have been used. It is a general principle of statutory construction that nontechnical words used in a statute are to be given their "natural, plain, ordinary, and commonly understood meaning."[19] Applying this principle, the word "maintained" must be held to mean:

> "To continue or persevere in or with; to carry on; as, to *maintain* an attack; . . . a correspondent [or a legal action].
> "To keep possession of; not to surrender or relinquish."[20]

Also the word "maintained" as used by Congress in referring to legal actions, has been judicially construed by the Supreme Court to mean "to uphold, continue on foot and keep from collapse a suit already begun."[21] It must be presumed that Congress was acquainted with this judicial construction of the term at the time it enacted the Fair Labor Standards Act.[22] In any event the existence of a right of removal in Section 16(b) action is at least doubtful. And where the right to remove is doubtful removal will be denied.[23]

*Applicable Statute of Limitations*

No time is specified in the Act within which actions to recover back wages must be instituted. While the Federal statutes provide a limitation of five years within which a suit or prosecution for "any penalty or forfeiture" accruing under the laws of the United States must be commenced,[24] as we have seen, an action for back wages and the additional liability provided in Section 16(b) of the Act is not such a suit. The Conformity Act[25] requires that, in the absence of a Federal statutory provision to the contrary, the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. It would seem then that under this provision the applicable state statute of limitations will govern in all actions instituted under Section 16(b) of the Act, whether in state or Federal courts. Also, the decision of the Supreme Court in *Erie R. R. v. Tompkins*[26] indicates that such corollary points as the time when the cause of action accrues will be governed by the state courts' decisions under

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[19] 59 C. J., STATUTES § 577, p. 974.
[20] WEBSTER'S NEW INTERNATIONAL DICTIONARY (1930).
[21] Justice Holmes in Smallwood v. Callardo, 275 U. S. 56, 61, 48 Sup. Ct. 23, 72 L. ed. 152 (1927).
[22] Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 57 Sup. Ct. 592, 81 L. ed. 789 (1937).
[23] Missouri Pacific Ry. v. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. 387, 40 L. ed. 536 (1896); Eldy v. Chicago & N. W. Ry., 226 Fed. 120 (W. D. Wis. 1915); and Siler v. Morgan Motor Co., 15 F. Supp. 468 (E. D. Ky. 1936).
[24] 15 STAT. 183 (1868), 28 U. S. C. A. § 791 (1928).
[25] 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1928).
[26] 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1938).

such applicable statutes of limitations.[27] Recent cases under the Act support this conclusion.[28]

*Survival of Actions*

There appears to be no case in which the question of survival of actions under Section 16(b) has been considered by the courts. The general rule is that a cause of action given by a Federal statute, if no specific provision is made by act of Congress for its survival, survives or not according to the principles of the common law existing in England at the time of the Revolution. And the Statute of Edward III[29] is regarded as a part of that common law.[30] Generally rights of action based on contract survived at common law, while those sounding in tort abated.[31] However, even in tort actions, if the injury giving rise to the right affected the property of the decedent, such actions, by virtue of the Statute of Edward III, did not abate. It would seem that the portion of the liability under Section 16(b) for actual as distinguished from liquidated damages is founded upon contract. The duty to pay arises out of the employment contract with the statute as an operative provision of that contract.[32] Hence there can be no question of survival as to that portion of the liability.

But when consideration is given to the "additional equal amount" provided in Section 16(b), we have an action which, though contractual in form and substance, permits damages to be given as for a wrong.

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[27]Moore v. Illinois Cent. R. R., 312 U. S. 630, 61 Sup. Ct. 754, 85 L. ed. 1089 (1941). *Cf.* 3 Fed. Rules Serv. 757; Note (1940) 49 YALE L. J. 738.

[28]Klotz v. Ippolito, 40 F. Supp, 422 (S. D. Tex. 1941); Wilkerson v. Swift & Co., 4 Wage Hour Rep. 305 (N. D. Tex. 1941); Littleton v. White Motor Co., N. D. Tex., June 7, 1941; Cline v. Super-Cold Southwest Co., 4 Wage Hour Rep. 583 (N. D. Tex. 1941); and Collins v. Hancock, 4 Wage Hour Rep. 522 (1st Dist. Caddo Parish, La. 1941).

[29]Statute *de Bonis Asportatis in Vita Testatoris,* 4 EDW. III, c. 7. This statute permitted executors to maintain action of trespass for chattels taken and carried away in the life time of the testator but did not cover cases involving death of the defendant. Moore v. Backus, 78 F. (2d) 571 (C. C. A. 7th, 1935), *cert. denied,* 296 U. S. 640, 56 Sup. Ct. 173, 80 L. ed. 455 (1936).

[30]Moore v. Backus, 78 F. (2d) 571 (C. C. A. 7th, 1935), *cert. denied,* 296 U. S. 640, 56 Sup. Ct. 173, 80 L. ed. 455 (1936); United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574, 577 (C. C. A. 2nd, 1916).

[31]A right of action to recover a penalty or forfeiture did not survive at common law. Such a right of action, though given by Federal statute, will not survive even though the statutes of the state may provide for the survival of similar action. Schreiber v. Sharpless, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. ed. 65 (1884). That an action under Section 16(b) may be considered as remedial is not controlling if the right of action is in truth one founded in tort. 1 C. J., ABATEMENT & REVIVAL § 407, 210.

[32]Cole v. Harker and Crouch, No. 34, W. D. Tenn., Oct. 10, 1939. In Turner v. Glickstein, 283 N. Y. 299, 28 N. E. (2d) 846 (1940), an employee action under section 16(b), there is a dictum to the effect that "the primary right arises from a tort. . . ." The court there held that there was no jurisdiction in equity for an accounting of wages and damages under the Act.

The question of survival of similar actions under the Anti-Trust Act[33] has been before the courts. Section 15 of that statute provides for triple damages to the party injured by a violation of that Act. In *Sullivan v. Associated Bill Posters*[34] an action for triple damages under the Anti-Trust Act was held to survive against the estate of the deceased wrongdoers; and in *Moore v. Backus*[35] a similar action was held to survive in favor of the estate of the deceased plaintiff. The rule is apparently the same where the "deceased party" is a dissolved corporation.[36] These cases proceed upon the theory that the action for triple damages is an action for injury to the plaintiff's property as a result of an illegal conspiracy; and that while such an action sounds in tort, it survives and may be pursued against the estate of a deceased person because the property or the proceeds or value of the property belonging to the plaintiff have been appropriated by the deceased person and added to his own estate or money.[37] This exception, as originally stated in the Statute of Edward III, covered only the death of the injured party. However, judicial decisions have extended its application to cases where the defendant wrongdoer is the deceased; provided, always, that the wrongful act resulted in both a decrease in the estate of the injured party and an increase in that of the wrongdoer.

If then, the "additional equal amount" provided in Section 16(b) is merely an incident to the main liability for back wages and takes upon itself the character of such main liability, it is contractual in nature and will survive. If, on the other hand, recovery of the "additional equal amount" be deemed to be separable[38] and sounds in tort, it is believed that, on the basis of the reasoning applied in the above cases under the Anti-Trust Act, an action under Section 16(b) would also survive; the estate of the deceased plaintiff-employee is decreased and that of the deceased defendant-employer is correspondingly increased by the differ-

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[33]26 STAT. 209 (1890), 50 STAT. 693 (1937), 15 U. S. C. A. § 1, *et seq.* (1941).

[34]6 F. (2d) 1000 (C. C. A. 2d, 1925).

[35]78 F. (2d) 571 (C. C. A. 7th, 1935), *cert. denied,* 296 U. S. 640, 56 Sup Ct. 173, 80 L. ed. 455 (1936).

[36]Imperial Film Exchange v. General Film Co., 244 Fed. 985, 986 (S. D. N. Y. 1915). As to the claim of an employee for back wages alleged to be due him by his bankrupt employer, see *In re* New Style Hat Mfg. Co., 4 Wage Hour Rep. 29 (N. D. Ohio 1940).

[37]United States v. Daniel, 6 How. 11, 12 L. ed. 323 (U. S. 1848); Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. ed. 713 (1901); Sullivan v. Associated Bill Posters, 6 F. (2d) 1000 (C. C. A. 2d, 1925); Moore v. Backus, 78 F. (2d) 571 (C. C. A. 7th, 1935), *cert. denied,* 296 U. S. 640, 56 Sup. Ct. 173, 80 L. ed. 455 (1936).

[38]See Abroe v. Lindsay Bros. Co., 4 Wage Hour Rep. 604 (Sup. Ct. Minn. 1941). The mandatory nature of the additional liability under Section 16(b) is discussed at p. 168 *infra.*

ence in money between what was actually paid and what might have been found due under Section 16(b).[39]

*Parties*

Section 16(b) provides for three kinds of employee actions. An action by the individual employee for himself only; an action by one or more employees on behalf of himself or themselves and other employees "similarly situated"; and an action by an agent or representative or an individual employee or employees on behalf of all employees "similarly situated." The first type of action presents no unusual difficulties, the question of parties being governed by general principles of law. The second[40] and third[41] type have occasioned several questions; principally, the application of Rule 23(a)[42] of the Federal Rules of Civil Procedure.[43]

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[39]The cases under the Anti-Trust Act do not directly pass upon the question whether the additional liability sounds in tort or contract. In Haskell v. Perkins, 28 F. (2d) 222, 224 (D. N. J. 1928) the court was of the opinion that the "treble damages and attorney's fee are both exemplary and punitive in their nature and do not survive the death of the alleged wrongdoer." However, this decision was reversed on other grounds in 31 F. (2d) 53 (1929), *cert. denied,* 279 U. S. 872, 49 Sup. Ct. 513, 73 L. ed. 1007 (1929). Decision on the same question was expressly reserved by the court in Sullivan v. Associated Bill Posters, 6 F. (2d) 1000, 1012 (C. C. A. 2d, 1925), though the court held that the additional liability was remedial and not penal, "irrespective of whether it limits the recovery to the amount of actual loss sustained or as cumulative damages as compensation for the injury." This would seem to indicate that the character of the "additional liability"—whether tort or contract—is determined by the nature of the primary liability. In Collins v. Hancock, 4 Wage Hour Rep. 522 (1st Dist. Caddo Parish, La. 1941) the court, in applying the state statute of limitations, held that the primary liability under Section 16(b) sounds in contract, but the "additional equal amount" was subject to limitation applicable to claims "arising from offenses."

[40]Saxton v. Askew Co., 38 F. Supp. 323 (N. D. Ga. 1941).

[41]Townsend v. Boston & M. R. R., 35 F. Supp. 938 (Mass. 1940).

[42]Rule 23(a) provides that: "If persons constituting the class are so numerous as to make it impracticable to bring them all before the court . . . one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced . . . is (1) joint, or common, . . . (2) several, and the object of the action is the adjudication of claims which do or may affect specific property . . .; or (3) several, and there is a common question of law or fact affecting the several rights and common relief is sought."

[43]Since Section 16(b) expressly authorizes class or representative actions by "any one" employee on behalf of *others* similarly situated, or by a designated representative of "such employee" on behalf of *all* employees similarly situated, it would seem that the requirements in Rule 23(a) of numerousness and adequacy of representation may be disregarded. *Quaere:* If an action by a representative can be maintained in behalf of less than *all* of the employees similarly situated? *See* Martin v. Lefkoff, 4 Wage Hour Rep. 605 (E. D. Tenn. 1941). Thomas v. Keystone Silver, Inc., 174 Misc. 733, 22 N. Y. S. (2d) 796 (1940) holds that such an action cannot be *continued* as to other employees similarly situated who affirmatively object. Townsend v. Boston & Maine R. R., 35 F. Supp. 938 (D. Mass. 1940) holds that a designation by one employee is sufficient, and only one agent can be appointed to bring the action. It is highly probable that the provision for actions by agents or representatives was designed to facilitate suits by union representatives on behalf of all members of their union similarly situated. *Cf.* Thomas v. Keystone Silver, Inc., *supra.* There seems to be no legislative history on this point.

As indicated by Professor Moore,[44] paragraph (a)(1) of Rule 23 provides for "true class actions" as the same were known at common law. The test of a joint or common right is whether the owners of the right are so related that no one of them could enforce the right, or his interest in the right, without the compulsory joinder of all the others.[45] Under this test both the class and the representative action provided by Section 16(b) of the Act are clearly not "true class actions." Normally, the relationship of each employee to his employer results from a contract between the two, express or implied, and such contract is unrelated, in the rights and duties thereby created, to the contractual relations that might exist between the employer and his other employees. Any one employee could, at common law, sue his employer for unpaid compensation without being compelled to join all of his fellow employees in the action; and there is nothing in Section 16(b) or in its legislative history to indicate that Congress intended to change this situation and provide for the compulsory joinder of employee claims under the Act.[46]

Since the class or representative action under Section 16(b) does not have for its object "the adjudication of the claims which do or may affect specific property involved in the action," obviously paragraph (a)(2) of Rule 23 has no application.

It follows then that if the class or representative action provided in Section 16(b) of the Act is to be brought within the purview of Rule 23 of the Federal Rules of Civil Procedure, it must necessarily come within paragraph (a)(3) of that rule. While the rights of the individual employees may be several, and common relief in the form of money damages may be sought, it is by no means certain that in each case a common question of law or fact affecting the several rights will be involved. Assuming, however, that this latter qualification may also be satisfied, there would seem to be no material advantage to be gained by attempting to bring such actions within the limits of paragraph (a)(3) of Rule 23. The judgment rendered in actions properly within this paragraph of Rule 23, binds only those parties actually before the court;[47] and recovery is limited to the plaintiff or plaintiffs named in the complaint and to such other employees as intervene, or join in the suit as plaintiffs, or actually designate an agent or representative to maintain the suit on their behalf.[48]

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[44] 2 MOORE, FEDERAL PRACTICE (1938) 2236.

[45] Rule 20, FED. RULES CIV. PROC., "Permissive Joinder of Parties."

[46] *Cf.* Saxton v. Askew Co., 35 F. Supp. 519 (N. D. Ga. 1940); Lofter v. First National Bank of Chicago, 4 Wage Hour Rep. 631 (N. D. Ill. 1941).

[47] 2 MOORE, FEDERAL PRACTICE (1938) 2291.

[48] Saxton v. Askew Co., 35 F. Supp. 519 (N. D. Ga. 1940); Brooks v. Southern Dairies, 38 F. Supp. 588 (S. D. Fla. 1941); Shain v. Armour & Co., 40 F. Supp. 488

As Professor Moore points out:

> "A person, who because of a common question of law or fact may be said to be a member of a class on whose behalf or against whom a spurious class suit [actions falling within Rule 23(a)(3)] is pending, may either ignore the action or intervene and become a party of record. Once having done the latter, however, he is a party to the action and whatever decree is rendered becomes *res judicata*."[94]

The class or representative action under Section 16(b) is authorized by that section, and the additional authority provided in Rule 23(a)(3) is not necessary.

When are employees "similarly situated" within the meaning of Section 16(b)? In several cases instituted by former employees on behalf of themselves and other employees of the defendant similarly situated, the defense has been made that the plaintiff, not being a present employee of the defendant, cannot be deemed to be similarly situated by defendant's present employees. This contention has been consistently overruled.[50] In *Clint v. Franklin Bargain House*[51] the court relied upon the opinion in *Independent Transport Co. v. Canton Ins. Office*[52] and held that the word "employed," as used in the definition of "employee" in Section 3(e) of the Act, "is a verb of past and present tense," and that "it is obvious that one who had worked and not been paid according to the Act could bring the action the same as if he were still employed." The court also overruled the contention that "similarly situated" referred to defendant's other employees who are in the same class or in the same department as the plaintiff, and held that "taking the purpose of the Act into consideration" the term "similarly situated" means "all employees who have not been paid according to the provision of the Act." "The Act was intended to and does link together all employees who are not paid according to its provisions and as to them creates a question of common

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(W. D. Ky. 1941); Hargrave v. Mid-Continent Petroleum Corp., 4 Wage Hour Rep. 352 (E. D. Okla. 1941); Harvey v. Florida Power & Light Co., S. D. Fla. 1941; Tedder v. Economy Wholesale Grocery Co., S. D. Fla. 1941.

[49]2 MOORE, FEDERAL PRACTICE (1938) 2292. Where, in a class or representative action in the Federal courts under Section 16(b) of the Act, a motion is made by the plaintiff, pursuant to Rule 34 of the Federal Rules of Civil Procedure, to inspect, copy, etc., pay roll, time, shipping, and other records of defendant, the motion, if granted, will be limited so as to permit inspection only as to the records pertaining to the parties actually before the court. Fishman v. Marcouse, 32 F. Supp. 460 (E. D. Pa. 1940); Saxton v. Askew Co., 38 F. Supp. 323 (N. D. Ga. 1941).

[50]Clint v. Franklin Bargain House, 4 Wage Hour Rep. 343 (Ohio 1941); Tedder v. Economy Wholesale Grocery Co., S. D. Fla. 1941; Harvey v. Florida Light & Power Co., S. D. Fla. 1941; Rakestaw v. Miami Bottled Gas Co., S. D. Fla., Jan. 30, 1941.

[51]4 Wage Hour Rep. 343 (Ohio 1941).

[52]173 Fed. 564 (W. D. N. D. 1909).

interest. Each is given the right to have his claim presented in the action of a fellow employee."[53]

Nor does the fact that the claims of the "similarly situated employees" differ as to the alleged number of hours worked, wages actually due, or hours of overtime involved prevent their joinder in the one action. As was recently observed by Judge Miller of the Western District of Kentucky in *Shain v. Armour & Co.*:[54]

> ". . . defendant contends that this statutory provision [joinder of claims of employees similarly situated] must be construed in accordance with generally accepted principles applicable to class suits, which means that class suits are not authorized where the parties sought to be represented have claims which are distinct and a subject of an independent suit, even though there may be a common question of law involved . . . [citing cases]. Those cases were decided in accordance with a familiar equity practice as codified by state statutes or Equity Rules. Such procedure is not controlling in the present case, which is governed by a Federal statute differently worded and evidently intended by its wording to be much broader in scope. The Federal statute authorized an employee to sue for himself "and other employees similarly situated." It is very comprehensive and inclusive; it contains no restrictions other than that the other employees be similarly situated. To read into it the restrictions claimed by the defendant to exist would for all practical purposes completely nullify the provision. It is of course, true, as the defendant contends, that many differences exist between the plaintiff and other employees of the defendant, even though engaged in the same type of work, such differences being as to the time worked, wages actually due, and hours of overtime involved. But such differences merely mean that their positions and claims are not identical; it does not follow that they are not similar. Employees may be similarly situated without being identically situated. The evident purpose of the Act is to provide one law suit in which the claims of different employees, different in amount but all arising out of the same character of employment, can be presented and adjudicated, regardless of the fact that they are separate and independent of each other. In such instances, where liability is denied by the employer, there are certain questions of both law and fact which are common to all employees engaged in the same character of work, such as whether or not the employer is engaged in the production of goods for commerce, whether or not the particular work of

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[53]Some justification for this interpretation may be found in the legislative history of the Act. Section 18(b) of the bill as passed by the Senate July 22, 1937, and presented to the House August 2, 1937, provided: ". . . employees entitled to reparations from the same employer may bring a joint action to recover such reparations, or, if separate actions are brought, such employees or the employer shall have the right to have such actions consolidated for trial."

[54]40 F. Supp. 488, 489 (W. D. Ky. 1941).

> the employees involved constitutes the production of goods for commerce, and whether or not any of the existing exemptions apply. . . . The plain words of the statute, which modify the existing equity practice in so far as this type of litigation is concerned, should therefore control insofar as they are not violative of constitutional provisions."

*Mandatory Nature of the Additional Liability: Attorney's Fees, etc.*

In several decisions under Section 16(b) it has been held that an award of the "additional equal amount" plus attorney's fees and cost is mandatory, and not dependent upon the willfulness of defendant's violations.[55] This view is supported by a comparison of Section 16(b) and Section 16(a); the latter, providing criminal penalties, expressly required that the element of willfulness be established.[56] Also the language of Section 16(b) uses the mandatory expression that the employer "shall be liable . . . in an additional equal amount as liquidated damages" and "the court . . . shall . . . award . . . a reasonable attorney's fee . . . and cost of the action" in the event judgment is awarded to the plaintiff.[57]

That Section 16(b), in providing for liquidated damages, attorney's fees, and cost to the successful plaintiff, does not contravene the due process clause of the Fifth Amendment seems to be established both by analogy to the triple damage provision of the Anti-Trust Act[58] and the

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[55]Eichorn v. Kilkenny, 1 Labor Service 11, 542 (N. J. 1939); Reeves v. Howard County Refining Co., 33 F. Supp. 90 (N. D. Tex. 1940); Lefevers v. General Export Iron & Metal Co., 36 F. Supp. 838 (S. D. Tex. 1941); St. John v. Brown, 38 F. Supp. 385 (N. D. Tex. 1941); Thompson v. Daugherty, 40 F. Supp. 279 (Md. 1941); Emerson v. Mary Lincoln Candies, 173 Misc. 531, 17 N. Y. S. (2d) 851 (1940); 174 Misc. 353, 20 N. Y. S. (2d) 570 (1940) *aff'd*, N. Y. Ct. of App., Nov. 25, 1941; Floyd v. DuBois Soap Co., 4 Wage Hour Rep. 77 (Ohio 1941), *aff'd*, 4 Wage Hour Rep. 541 (Ohio 1941); Reck v. Zarnocay, 4 Wage Hour Rep. 344 (Sup. Ct. N. Y. 1941); Wagner v. Estate of Field, 4 Wage Hour Rep. 329 (Super. Ct. Ind. 1941); McMillan v. Wilson & Co., 4 Wage Hour Rep. 409 (Minn. 1941); Abroe v. Lindsay Bros. Co., 4 Wage Hour Rep. 604 (Sup. Ct. Minn. 1941).

[56]Compare also the language of Section 16(b) with that of the Seaman's Act, 30 STAT. 756 (1915), 46 U. S. C. A. § 596 (1926) and the National Bank Act, 13 STAT. 108 (1864), 12 U. S. C. A. § 86 (1934). In the last two statutes liability is predicated upon culpability.

[57]It would seem to be beyond question that the interest of the public, in seeing that the minimum compensation required under the Act is actually paid, is such that the employee cannot waive or be estopped to assert his claim. Fleming v. Warshawsky & Co., C. C. A. 7th, Nov. 28, 1941; City of Glendale v. Coquat, 46 Ariz. 478, 52 P. (2d) 1178 (1935); Larsen v. Rice, 100 Wash. 642, 171 Pac. 1037 (1918). Specific prohibitions against waivers were included in both the original House and Senate bills. Employee actions under Section 16(b) in which the courts have disapproved the defense of waiver or estoppel include: Cole v. Harker and Crouch, No. 34, W. D. Tenn. Oct. 10, 1939; Cintron v. Central Rio Llano, No. 2522, D. C. Puerto Rico, May 13, 1940; Cotton v. Ottenheimer Bros., 4 Wage Hour Rep. 109 (E. D. Ark. 1941), *aff'd*, 119 F. (2d) 781 (C. C. A. 8th, 1941); Crocker v. Town of Manchester, 4 Wage Hour Rep. 273 (Tenn. 1941); Davis v. Perfect Belt Mfg. Co., N. D. Ga., March 6, 1941; Travis v. Ray, 4 Wage Hour Rep. 580 (W. D. Ky. 1941).

[58]26 STAT. 209 (1890), 50 STAT. 693 (1937), 15 U. S. C A. § 1, *et seq.* (1941).

decisions of the Supreme Court upholding similar state enactments alleged to be violative of the due process clause of the Fourteenth Amendment.[59]

While this discussion has been limited to the major legal problems presented in employee actions under Section 16(b) of the Act, many of the minor questions presented should not be overlooked. For example, the courts have uniformly held that a complaint in an employee suit which fails to allege facts sufficient to show that the plaintiff is himself engaged in commerce or in the production of goods for commerce within the meaning of the Act, will be dismissed.[60]

*Conclusion*

Finally, a word of practical advice may be ventured. Section 16(b) provides a remedy which is solely within the hands of the employee. It can easily be abused and brought into disrepute by using it as a vehicle for the prosecution of ill-founded and ill-prepared actions. It should be remembered that all of the questions we have discussed herein are likely to arise in any employee suit, and unless counsel is prepared to meet them, it would be better to delay the filing of the action until such time as the available authorities have been checked. While the Government ordinarily has no direct interest in private litigation under the Act, it is interested in having its views presented to the court whenever questions of constitutionality or interpretations are being decided. This has been accomplished frequently either by intervention or by appearing as *amicus curiae*. The Wage and Hour Division attempts to keep a record of all employee cases called to its attention. Thus far the records indicate that more than 2,500 actions have been filed. The Division is also anxious to be of assistance to employees as well as employers and the attorneys on its legal staff in Washington as well as those in its regional and branch offices will welcome an opportunity to discuss with counsel the peculiar problems presented in his case.

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[59]Life & Casualty Co. v. McCray, 291 U. S. 566, 54 Sup. Ct. 482, 78 L. ed. 987 (1934), and cases reviewed therein.

[60]Bagby v. Cleveland Wrecking Co., 28 F. Supp. 271 (W. D. Ky. 1939); Foster v. National Biscuit Co., 31 F. Supp. 552 (W. D. Wash. 1940); Gates v. Graham Ice Cream Co., 31 F. Supp. 854 (Omaha Div. Neb. 1940); Wood v. Central Sand & Gravel Co., 33 F. Supp. 40 (W. D. Tenn. 1940); Wonham v. Pennsylvania Greyhound Lines, 4 Wage Hour Rep. 218 (E. D. Pa. 1941).

# Control Over Distribution: Monopoly Aspects of Restraints Upon Distributors and Producers

*George E. Hale**

Manufacturers and other producers frequently believe it desirable to control the distribution of their wares. They find it in their interest to supervise the channels through which their products move to the consumer. Thus the brewer may insist that the saloonkeeper deal exclusively in his beer, buying his "requirements" from the brewer alone. The refiner may insist that the filling station operator sell his grease as well as his gasoline, "tying" the products together. Again, the automobile manufacturer may require his dealers to service the cars they have sold, or to carry a certain stock of used automobiles for sale.

In turn, the distributors demand privileges from producers. A mail order house may seek to purchase all the bath tubs a manufacturer produces and demand an "output" contract. More narrowly, a department store may require the privilege of exclusive sale of a brand of perfume within the city in which it is located. Reciprocally, such an exclusive sales area may lead to a counter-restriction in that the department store is forbidden to sell without the district.

In each of the above instances and the many others which arise every day in our commerce, some one has attempted to exercise control over distribution beyond his own doors. In this paper such controls will be examined in the light of the law of monopoly.[1] To what extent are such practices legal and desirable? Which, if any, increase the cost of distribution without compensating advantages? To what extent may monopolistic practices be justified? Such are the questions arising in this field.

## *"Requirements" Contracts*

Perhaps the most pressing problem is that raised by a contract in which a distributor, wholesale or retail, agrees to purchase his "requirements" from a specific producer. Not only are such contracts relatively

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[1]Retail price maintenance will not be included, since it is so widely approved by legislatures today. *E.g.*, 50 Stat. 693 (1937), 15 U. S. C. A. § 1 (1941).

common in the business world, but they suggest at once the main considerations applicable to the subject as a whole.[2]

In the absence of statute, the courts seem to test the legality of the arrangement by determining whether its effect will be to "corner" the market.[3] Thus, in *United States v. Corn Products Refining Co.*[4] it was found that the defendant corporation, which had bought up many of its competitors and was itself a combination, had offered its customers a ten per cent discount or rebate on purchases, payable one year later and conditional on the purchaser's not having patronized a competitor during the interval. This practice was condemned by the court, which ordered a dissolution of the combination.[5] On the other hand, in the early case of *Clark v. Crosby*[6] it was held legal for a dentist to agree to purchase his requirements of false teeth from a single manufacturer. And this is typical of decisions in which the court is faced with a single contract[7] as to a small retailer.[8]

Thus it is generally lawful for a refiner to arrange with a filling station operator that the latter shall sell only the refiner's gasoline.[9] Again judicial approval is usually granted a similar arrangement between

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[2]Like problems may be raised by business practices different in form but having the same effect, and like considerations should apply to them. Thus, in Vitagraph, Inc. v. Perelman, 95 F. (2d) 142 (C. C. A. 3d, 1938) the alleged effect of the action of certain distributors of motion pictures in refusing to sell to exhibitors who ran "double features" was to force the exhibitors to purchase their requirements from these distributors, since under the "single feature" system the number of features was reduced and these distributors offered the more desirable motion pictures.

[3]This may be said to be the older conception of "monopoly," as opposed to the new theories of "oligopoly." Harrod, *Doctrines of Imperfect Competition* (1934) 48 Q. J. Econ. 442.

[4]234 Fed. 964 (S. D. N. Y. 1916).

[5]*Accord:* Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 29 Sup. Ct. 280, 53 L. ed. 486 (1909); State v. Lewis & Leidersdorff, 201 Wis. 543, 230 N. W. 692 (1930). *Cf. Fleischmann Co.*, 1 F. T. C. 119 (1918).

[6]37 Vt. 188 (1864).

[7]It may make a difference how the case arises. Thus, in a suit on the contract between the (private) parties, judicial approval may be less difficult to secure than when the same arrangement is presented in an action under the anti-trust laws. United States v. Corn Products Refining Co., 234 Fed. 964 (S. D. N. Y. 1916). In the latter instance all of the producer's arrangements of this type are normally brought to the court's attention and the attempt to corner, if any, made more apparent.

[8]Whitwell v. Continental Tobacco Co., 125 Fed. 454 (C. C. A. 8th, 1903); Brown v. Rounsavell, 78 Ill. 589 (1875); Southern Fire Brick Co. v. Garden City Sand Co. 223 Ill. 616, 79 N. E. 313 (1906); Wood Mowing Co. v. Greenwood Hardware Co., 75 S. C. 378, 55 S. E. 973 (1906); Sullivan v. Rime, 35 S. D. 75, 150 N. W. 556 (1915); *see* Newell v. Meyendorff, 9 Mont. 254, 261, 23 Pac. 333, 334 (1890).

[9]Associated Oil Co. v. Meyers, 217 Cal. 297, 18 P. (2d) 668 (1933); McQuaig v. Seaboard Oil Co., 96 Fla. 275, 118 So. 424 (1928); Gulf Refining Co. v. Smith, 164 Ga. 811, 139 S. E. 716 (1927); Independent Gas & Oil Co. v. Smith Co., 51 Idaho 710, 10 P. (2d) 317 (1932); Cantrell v. Knight, 72 S. W. (2d) 196 (Mo. App. 1934) (decision under Mo. Laws 1889, p. 96, Mo. Rev. Stat. (1929) §§ 8700, 8701); Cox, Inc. v. Humble Oil & Refining Co., 16 S. W. (2d) 285 (Tex. Comm. App. B. 1929) (grounds throw doubt on many previous decisions in Texas).

brewer and saloonkeeper.[10] Considerably more has been permitted by the U. S. Supreme Court. In *Chicago, St. Louis & New Orleans Ry. v. Pullman Southern Car Co.*[11] the railway agreed to allow the sleeping car company to supply all sleeping cars used on its lines for fifteen years and not to permit rival cars upon its tracks. The contract was held valid. And in the well-known first shoe machinery case[12] the court held legal a large number of leases of patent machinery which required that the lessees use no machinery of the lessor's rivals; that is, that the shoe manufacturer take his "requirements" from the defendant. In view of the dominant position enjoyed by the lessor the soundness of this decision may be questioned and it is likely that decisions of this type led to the passage of the statutes which now generally control this subject.

In the domain of interstate commerce, section three of the Clayton Act[13] has supplanted the rule of the first shoe machinery case.[14] While largely directed at the "tying clause" practice[15] the statute also affects requirements contracts.[16] State legislation of much the same tenor is in force in many jurisdictions.[17] No statute, however, is self-executing in the sense that no room is left for interpretation of its terms. Thus, the relevant portion of the Clayton Act provides:

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[10]Joseph Schlitz Brewing Co. v. Travi, 179 Ill. App. 269 (1913); Ferris v. American Brewing Co., 155 Ind. 539, 58 N. E. 701 (1900); Joseph Schlitz Brewing Co. v. Nielson, 77 Neb. 868, 110 N. W. 746 (1906). *But cf.* Federal Alcohol Administration Act of 1935, 49 STAT. 977, 981 *et seq.* (1935), 27 U. S. C. A. § 205 (1926).

[11]139 U. S. 79, 11 Sup. Ct. 490, 35 L. ed. 97 (1891).

[12]United States v. United Shoe Machinery Co., 247 U. S. 32, 38 Sup. Ct. 473, 62 L. ed. 968 (1918). This case was decided under the Sherman Act [26 STAT. 20 (1890), 15 U. S. C. A. § 1 (1941)], but for this purpose the statute may be regarded as declaratory. *See* Standard Oil Co. v. United States, 221 U. S. 1, 59, 31 Sup. Ct. 330, 55 L. ed. 353 (1911).

[13]38STAT. 730, 731 (1914), 15 U. S. C. A. § 14 (1941).

[14]This is indicated in the case of United Shoe Machinery Co. v. United States, 258 U. S. 451, 42 S. Ct. 363, 66 L. ed. 708 (1922).

[15]That is, at contracts whereby the lessee of shoe machinery agreed to take his requirements of different types of machinery from the lessor. Both the usual "requirements" contract (that is, an agreement to take all needed machines of the *same* type as that leased) and "typing" clauses were involved in the shoe machinery litigation.

[16]United Shoe Machinery Co. v. United States, 258 U. S. 451, 42 S. Ct. 363, 66 L. ed. 708 (1922); Fleischmann Co., 1 F. T. C. 119 (1918).

[17]*E.g.*, Kan. Laws 1907, c. 139, § 1, KAN. GEN. STAT. ANN. (1935) c. 16, § 112; La. Laws, 1915, No. 11, § 4, LA. CODE PRAC. ANN. (Dart., 1939) §§ 4908, 4958, 4959; Mass. Laws, 1901, c. 478, MASS. ANN. LAWS (1933) c. 93, § 1, applied in Commonwealth v. Strauss, 191 Mass. 545, 78 N. E. 136 (1906); Mich. Pub. Acts 1889, § 225, Mich. Pub. Acts 1905, § 229, MICH. STAT. ANN. (Henderson, 1938) § 28.825; N. C. Laws 1913, c. 41, § 5, N. C. CODE ANN. (1939) § 2563, applied in Standard Fashion Co. v. Grant, 165 N. C. 453, 81 S. E. 606 (1914). *See* Pope-Turnbo v. Bedford, 147 Mo. App. 692, 697, 127 S. W. 426, 428 (1910); Tex. Acts 1899, p. 246, Tex. Acts 1903, p. 119, TEX. ANN. REV. CIV. STAT. (Vernon, 1939) § 7426. The Texas statute is less specific in its terms but "requirements" contracts have been held invalid under it. Texas Brewing Co. v. Templeman, 90 Tex. 277, 38 S. W. 27 (1896); Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804 (1899); Wood v. Texas Ice Co., 171 S. W. 497 (Tex. Civ. App. 1914); Henderson Tire Co. v. Roberts, 12 S. W. (2d) 154

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for the sale of . . . wares . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the . . . wares . . . of a competitor . . . of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

and the legislation in the states is similar. Let us examine certain situations in which the application of the acts is doubtful.

By its terms, the statute applies only when there is a substantial reduction in competition—a qualification (upon otherwise vigorous language) comparable to the "rule of reason" of the Sherman Act. While the qualification may be necessary to the continuance of enterprise, it thrusts burdens upon the Federal Trade Commission and the courts.

In general, substantial reduction in competition has borne, both in the view of courts and the Commission, a high correlation to the importance of the producer's position in the industry.

Some cases have been easy to decide. As an illustration of a recent case in which decision was not difficult there may be cited *Carter Carburetor Corporation v. Federal Trade Commission.*[18] In a proceeding before the Commission the respondent was found to be a leading manufacturer of carburetors. Together with its leading competitor it produced some ninety per cent of the carburetors installed on new cars, the respondent selling roughly twice as many as the leading competitor. In the other branch of the business, that is, supplying automobiles in service, the respondent was doing some third of the total business. This replacement business was carried on through garages specializing in carburetor repair, and in these retailers also gave free service upon the manufacturer's warranty of carburetors installed in new cars. A new rival of respondent succeeded in taking away part of respondent's new car business, contract-

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(Tex. Comm. App. 1929); Manufacturers Finance Corp v. Fort Worth Paper Co., 68 S. W. (2d) 307 (Tex. Civ. App. 1933).

Apparently there is more in the Texas reports on this and allied subjects than in many other jurisdictions combined. Perhaps both the legislature and courts of Texas have taken more interest and action than others. It would be interesting to observe the results of this activity upon commercial practices, albeit conclusions might be obscure. *Cf.* Nutting, *The Texas Anti-Trust Laws: A Post-Mortem* (1936) 14 Tex. L. Rev. 293. No attempt is made here to collate or reconcile the Texas authorities or those of any other particular jurisdiction.

In England contracts of this type are prohibited as to patent articles. Patent & Designs Act, 1907, 7 Edw. VII, c. 29, § 38.

[18]112 F. (2d) 722 (C. C. A. 8th, 1940).

ing with two important manufacturers of automobiles upon the usual terms, which included a guaranty of ninety days satisfactory performance and service during the period. Whereupon respondent informed the trade that garages handling the new rival brand or parts therefor would no longer be entitled to the customary discount from respondent's "list" prices. Since the discount was large and since respondent's large share of the new car business made it imperative that every garage be able to repair and replace respondent's product, many garages refused to deal in the new rival brand. The effect of this refusal was to make it impossible for the new rival to service his product under his guaranty to the maker of the car and hence to endanger, at least, his new car business. As the court described the situation:[19]

> "It follows that practices of a dominant carburetor manufacturer which are designed to and do prevent a new manufacturer from obtaining a foothold in the service field will handicap the new manufacturer in selling his carburetors for original equipment and may prevent him from marketing a superior product at an equal or lower price. The petitioner's [respondent's] restraint upon competition works in a vicious circle, since service sales on any carburetor normally depend upon the number of automobiles equipped with that carburetor, and loss of service sales and distribution by the carburetor manufacturer in turn affects his ability to meet price competition and service requirements in offering his product for original equipment."

It was held that the practice was illegal. The court declared:[20]

> "We hold that the effect of the action of petitioner here complained of was to lessen competition within the prohibition of Section 3 . . .
>
> "The action of petitioner also tends to create monopoly. . . . It [petitioner's announcement to garages] must be deemed to have established petitioner's policy to exclude new competition from the carburetor field which if vindicated may be extended to complete monopoly. That petitioner's action has not effected complete monopoly, and that it still does not control all or nearly all of the carburetor business, is not determinative. Sections 2 and 3 of the Clayton Act . . . reflect the intent of Congress to prevent courses of action having a tendency to create a monopoly before actual monopoly has been accomplished . . . By its accused action petitioner has attempted to control the carburetor business of practically all service stations . . . and they, as observed, perform a vital function in the distribution of carburetors and in meeting the requirements of the public using

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[19]Carter Carburetor Corp. v. Federal Trade Comm., 112 F. (2d) 722, 733 (C. C. A. 8th. 1940).

[20]*Id.* at 733 *et seq.*

> the carburetors. Hitherto they have serviced the various makes of carburetors. The petitioner attempts to confine them to its own products and so comes within the statute."

As stated above, the courts have generally found the statute applicable where the producer is of considerable size.[21] On the other hand, where the producer is a "little fellow", the restraint is found not to be substantial.[22] An interesting case of the less easy type is *Wiseman v. Dennis*.[23] Plaintiff, a jobber of gasoline, did about two per cent of the business in the state of Virginia and about twelve per cent of that in the city of Richmond. He sued to enforce a requirements contract into which the defendant, an operator of a filling station, had entered. It was held that the contract did not substantially curtail competition but only affected it remotely.[24] This situation would seem to give rise to the question of what constitutes a monopoly,[25] a matter which has recently reengaged the interest of economists.[26] Were the doctrines of "monopolistic competition" to be applied vigorously it is possible that a different result would have been reached in the instant case. But much can be said for the rule that applies the statute only to larger producers. It reflects the reality that important restraints can only be the work of someone with economic power.[27] And the justification accepted in one case,[28] that the practice was adopted in a desperate attempt to compete with a dominant competitor, may be as practical as it is unorthodox.

At what level must competition be substantially reduced for the

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[21]Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 42 S. Ct. 360, 66 L. ed. 653 (1922); Butterick Co. v. Federal Trade Comm., 4 F. (2d) 910 (C. C. A. 2d, 1925); Q. R. S. Music Co. v. Federal Trade Comm., 12 F. (2d) 730 (C. C. A. 7th, 1926); Fleischmann Co., 1 F. T. C. 119 (1918).

[22]Pearsall Butter Co. v. Federal Trade Comm., 292 Fed. 720 (C. C. A. 7th, 1923); Excelsior Motor Mfg. Co. v. Sound Equipment, Inc., 73 F. (2d) 725 (C. C. A. 7th, 1934); Wiseman v. Dennis, 156 Va. 431, 157 S. E. 716 (1931).

[23]Wiseman v. Dennis, 156 Va. 431, 157 S. E. 716 (1931). *Cf.* United States v. United States Steel Corp., 251 U. S. 417, 40 S. Ct. 293, 64 L. ed. 343 (1920); Oxford Varnish Corp. v. Ault & Wiberg Corp., 83 F. (2d) 764 (C. C. A. 6th, 1936).

[24]The controlling Virginia statute expressly adopted the federal laws so that the test was precisely the same as if interstate commerce had been involved. Va. Acts 1926, c. 171, p. 314, VA. CODE ANN. (Michie & Sublette, 1936) § 4722 (21).

[25]For present purposes it may be taken that the language of the statute "tend to create a monopoly" is tautological (that is, that any act which "substantially lessens competition" will also "tend to create a monopoly"). Hence there will be no independent discussion of this phrase.

[26]CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1935); ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1933).

[27]NATIONAL INDUSTRIAL CONFERENCE BOARD, PUBLIC REGULATION OF COMPETITIVE PRACTICES (1925) 181. Of course a newcomer to an industry who had no appreciable share of its total sales might have economic power of other types. Apparently this case has not yet arisen except to the extent that Carter Carburetor Corp. v. Federal Trade Comm., 112 F. (2d) 722 (C. C. A. 7th, 1940) may be considered such an instance.

[28]Excelsior Motor Mfg. Co. v. Sound Equipment, Inc., 73 F. (2d) 725 (C. C. A. 7th, 1934).

statute to operate? That is, does it suffice that competition among wholesalers is impaired, or must there be (also) an effect at the retail level? A single decision has dealt with this matter.[29] The plaintiff operated a gasoline filling station near a railway, and was equipped to receive gasoline from tank cars. Defendant, a refiner and distributor of gasoline, offered gasoline for sale at two prices, the "tank car" price for large quantities, and the "tank wagon" price for smaller amounts. Plaintiff alleged that defendant refused to sell him gasoline at the "tank car" price solely because he would not agree to purchase his requirements of defendant. He did not allege, however, that he would have retailed the gasoline to consumers at a lower price than other filling station operators, many of whom could only purchase in "tank wagon" quantities for want of facilities. It was held that the plaintiff had failed to state a cause of action. The court said that it was necessary to allege a detrimental effect upon the consumer.[30]

It can be argued that the court took too narrow a view of the purposes of the anti-trust laws in regarding them simply as protection for the consumer. While the authors of the legislation probably failed to consider this precise point, they may be presumed to have intended the preservation and encouragement of a system of free enterprise under which resources are allocated without artificial restraints. Under such a view, the plaintiff might be entitled to the additional profit accruing from his favorable position if he could purchase at "tank car" prices. Moreover, it is scarcely sound to assume in the absence of an allegation to the contrary, that plaintiff would not have sold to consumers for less than competing filling stations.[31]

So long as a distinction is maintained between public utilities, which must serve everyone, and free enterprise, which is under no such obligation, it will be difficult to make wholly effective a policy such as that expressed in this section of the Clayton Act. That is, the producer may refuse to deal at all with the distributor who does not sign a requirements contract.[32] Again, there is room for interpretation as to what it means to fix a price or rebate. A leading refiner of corn products distributed

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[29]Lipson v. Socony-Vacuum Corp., 87 F. (2d) 265 (C. C. A. 1st, 1937).

[30]As an alternative ground, the court held that the defendant was not engaged in interstate commerce.

[31]It would be sounder to place this decision solely on the ground that the defendant had merely refused to deal in "tank car" gasoline, and that a mere refusal to deal, in accordance with the views of the next paragraph, is not illegal. This is treating the "tank car" lot of fuel as a different "commodity." *Cf.* ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1933) 4 *et seq.*

[32]*Cf.* United States v. Colgate & Co., 250 U. S. 300, 39 S. Ct. 465, 63 L. ed. 992 (1919); Federal Trade Comm. v. Raymond Bros.-Clark Co., 263 U. S. 565, 44 S. Ct. 162, 68 L. ed. 448 (1924); Staroske v. Pulitzer Publishing Co., 235 Mo. 67, 138 S. W. 36 (1911).

its wares through wholesalers who, in turn, sold to retailers. The refiner made it a practice to assist the wholesalers by having its own salesmen call upon the retailers and take orders for its products, to be filled by the wholesalers. After this policy had been in effect for some time the refiner announced that no further assistance would be given wholesalers who dealt in rival brands. This move was held to be within the Clayton Act by the Federal Trade Commission.[33] It may be doubted whether the courts are ready to accept such a broad definition of "price" and whether the Commission itself would have reached the same result had the refiner merely extended the salesmen's assistance to those who signed requirements contracts and never withdrawn it from those who refused.[34]

So much for the state of the law. As to its wisdom, there seems little room to doubt the soundness of the Clayton Act so long as a system of free enterprise remains our ideal. As Professor Handler has pointed out, the requirements contract is essentially a boycott.[35] In applying the statute, as pointed out above, it may be necessary to resort to definitions of monopoly in order to ascertain whether the restraint of trade is substantial. Further, it may be necessary to take account of certain commercial practices, perhaps better explained by history than logic, which affect the amount of restraint worked by a requirements contract. It may make a difference, for instance, if the product in question is customarily sold in specialty stores. Thus, a requirements contract may be quite different if applied to a saloon for a brewer than if applied to a department store for the benefit of a manufacturer of thread. It is not difficult to open a new saloon in which to vend a rival beer, but one cannot open a department store simply to carry a competing brand of thread.[36]

### *"Tying" Clauses*

If a manufacturer offers a stapling machine for sale only upon the condition that all staples used therewith be purchased from him, the staples are said to be "tied" to the sale of the machine. Supplies, repair parts and complementary machines are common subjects of tying clauses. Fre-

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[33]Penick & Ford, Ltd., 14 F. T. C. 261 (1930). The Commission also based its order upon §5 of the Federal Trade Commission Act, 38 STAT. 717, 719 (1914), 15 U. S. C. A. § 45 (1941) prohibiting unfair trade practices. *Cf.* Butterick Publishing Co. v. Fisher, 203 Mass. 122, 89 N. E. 189 (1909).

[34]Another opening in the statute is found in those lines of commerce sufficiently stable for the making of a contract for a definite amount of produce which will have the effect of a "requirements" contract. *Cf.* Cox, Inc. v. Humble Oil & Refining Co., 16 S. W. (2d) 285 (Tex. Comm. App. 1929).

[35]Handler, *Unfair Competition* (1936) 21 IOWA L. REV. 175, 204; Murphy, *What Can We Do If Competition Has Gobbled Up the Good Outlets?* (1936) 39 SALES MANAGEMENT 790. *Cf.* BRANDEIS, *The Solution of the Trust Problem*, in THE CURSE OF BIGNESS (Frankel ed. 1935) 129, 131.

[36]NATIONAL INDUSTRIAL CONFERENCE BOARD, PUBLIC REGULATION OF COMPETITIVE PRACTICES (1925) 183.

quently there is some price concession on the chief product with the expectation of recouping on the tied sales.

Essentially, the tying clause is but a form of the requirements contract. Hence the applicable law has already largely been suggested. Thus, the practice is generally approved in the absence of statute[37] and the Clayton Act and similar legislation in the states were particularly designed to put a stop to the tying clauses.[38] And it is interesting to note how frequently tying clauses were prohibited in the N. R. A. codes. Some of them provided that no producer should compel a buyer to purchase one product in order to obtain another;[39] other codes prohibited the "coercion" of distributors,[40] while a third group forbade rebates conditioned on tied purchases.[41]

A common type of tying clause is found in leases of gasoline dispensing equipment. Refiners rent the pumps and tanks to filling station operators for a dollar a year, conditioned on the use of the pump for the refiner's gasoline only. Apparently this practice has always received approval in the courts [42] and at least one statute actively promotes the prac-

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[37]United States v. United Shoe Machinery Co., 247 U. S. 32, 38 S. Ct. 473, 62 L. ed. 968 (1918); Brown v. Rounsavell, 78 Ill. 589 (1875); Celli & Del Papa v. Galveston Brewing Co., 227 S. W. 941 (Tex. Comm. App. 1921); Rose v. Gordon, 158 Wis. 414, 149 N. W. 158 (1914); Catt v. Tourle, L. R. 4 Ch. App. 654 (1869); United Shoe Machinery Co. of Canada v. Brunet, [1909] A. C. 330 (P. C.). *But cf.* United States v. General Electric Co., 1 D. & J. 271 (C. C. N. D. Ohio 1911) (under Sherman Act); Pope-Turnbo v. Bedford, 147 Mo. App. 692, 127 S. W. 426 (1910) (under general statute prohibiting restraints of trade); Crawford & Murray v. Wick, 18 Ohio St. 190 (1868).

[38]United Shoe Machinery Co. v. United States, 258 U. S. 451, 42 S. Ct. 363, 66 L. ed. 708 (1922); 38 STAT. 730, 731 (1914), 15 U. S. C. A. § 14 (1941); Elliott Machinery Co. v. Center, 227 Fed. 124 (W. D. Mich. 1915); California Automobile Dealers' Anti-Coercion Act, Cal. Laws 1935, p. 1755, CAL. GEN. LAWS (Deering, 1937) § 5137; Kan. Laws, 1907, c. 139, § 1, KAN. GEN. STAT. ANN. (1935) c. 16, § 112; Patent & Designs Act, 1907, 7 EDW. VII, c. 29, § 38; Huntoon Co. v. Kolynos, Inc., [1930] 1 Ch. 528 (C. A.).

[39]National Industrial Recovery Act, 48 STAT. 195 (1933), 15 U. S. C. A. § 703 (1941); *Electric Storage and Wet Primary Battery Industry Code* (December 7, 1933) schd. I, 8; *Excelsior and Excelsior Products Industry Code* (December 7, 1933) VII, 16; *Fishing Tackle Industry Code* (August 19, 1933) III, 4; *Marking Devices Industry Code* (October 20, 1933) VIII, 9; *Pipe Nipple Manufacturing Industry Code* (November 27, 1933) VIII, 13; *Umbrella Industry Code* (October 9, 1933) IX, 1s; *Wholesale Food and Grocery Trade Code* (January 4, 1934) VII, 6; *Wholesaling or Distributing Trade Co.* (January 12, 1934) VII, 9; *Retail Tobacco Trade Code* (June 19, 1934) VII, 9; *Bottled Soft Drink Industry Code* (June 7, 1934) VII, 11; *Candy Manufacturing Industry Code* (June 11, 1934) VIII, 11; *Cigar Manufacturing Industry Code* (June 19, 1934) VII, 8.

[40]*Wholesale Automotive Trade Code* (December 18, 1933) VII, 1; *Wholesale Fresh Fruit & Vegetable Distributive Industry Code* (June 29, 1934) VII, 11.

[41]*Gasoline Pump Manufacturing Industry Code* (September 18, 1933) VI, 4b; *Metal Tank Industry Code* (December 15, 1933) VII, 1p; *Petroleum Code* (August 18, 1933) V, 7b (as amended); *Stone Finishing Machinery and Equipment Industry Code* (December 15, 1933) VII, k.

[42]Federal Trade Comm. v. Sinclair Refining Co., 261 U.S. 463, 43 S. Ct. 450, 67 L.ed. 746 (1923); Standard Oil Co. of N. Y. v. Federal Trade Comm., 273 Fed. 478 (C.C.A. 2d, 1921); Canfield Oil Co. v. Federal Trade Comm., 274 Fed. 571

tice.[43] In the N R A Petroleum Code[44] tying arrangements of this character received extensive treatment. Rentals of pumps at nominal leases and so forth were prohibited and the code forced refiners to sell pumps at the same prices as those charged by the pump manufacturers. When a lease presently in existence ran out, the refiner was obliged to sell the equipment either to the retailer or another refiner at certain minimum prices and loans to retailers were not allowed. On the other hand, refiners were permitted to operate their own stations and were entitled to insist that no other gasoline than their own be dispensed from a pump bearing their trade names.

A distinction can be drawn between the gasoline pump cases and other tying arrangements. The pump is not a consumable item, but merely an aid to the convenient disposal of the principal product. Tanks for acetylene gas,[45] refrigerators for ice cream,[46] gas cooking ranges[47] and coffee urns[48] are other items of a similar character which have received the attention of the courts and which should be governed by similar considerations. In favor of the practice, it can be said that it merely constitutes a convenient extension of credit, for obviously the pump or other device must be paid for eventually. Further, it would be difficult to show that the practice promoted widespread or inefficient circuitous integration of industry. On the other hand, it may be argued that once a refiner has supplied as many pumps to a given filling station as are needed, no other refiner will supply additional pumps, albeit he is legally free to do so. In effect, therefore, the result may be the same as a "requirements" contract.[49]

As has been suggested in connection with "requirements" contracts, there will always be a certain amount of tying under an enterprise system.

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(C.C.A. 6th, 1921); Associated Oil Co. v. Myers, 217 Cal. 297, 118 P. (2d) 868 (1933); Independent Gas & Oil Co. v. Smith Co., 51 Idaho 710, 10 P. (2d) 317 (1932); Quincy Oil Co. v. Sylvester, 238 Mass. 95, 130 N.E. 217 (1921). *Cf.* State v. Gulf Refining Co., 279 S.W. 526 (Tex. Civ. App. 1925).

[43]N. Y. Laws 1928, c. 182, N. Y. PENAL LAW (Baldwin, 1938) § 445. Ostensibly the statute is aimed at deception of the consumer through the sale of A's gasoline in a pump bearing B's trade mark.

[44]*Petroleum Code* (August 18, 1933) V, 7A (3), (4), 7B, 8, 12, 13, 20.

[45]Auto Acetylene Light Co. v. Prest-O-Light Co., 276 Fed. 537 (C.C.A. 6th, 1921) (held not within statute).

[46]Clare v. Ice Cream Cabinet Co., 11 N. J. Misc. 386, 166 Atl. 722 (1933) (held not within statute).

[47]Coombs v. Burk, 40 Cal. App. 8, 180 Pac. 59 (1919) (held invalid).

[48]C. H. Kroneberger, 2 F.T.C. 399 (1914) (held invalid).

[49]A clever use of the patent monopoly to achieve something like the obverse of this situation is found in Vulcan Mfg. Co. v. Haytag Co., 73 F. (2d) 136 (C.C.A. 8th, 1934). Suppose a manufacturer of photographic equipment vends a camera which will not use standard film. Film to fit the camera is manufactured only by the maker of the camera and this film represents only a slight modification of film generally available on the market, the modification adding no appreciable advantage in service. Upon this modified film the manufacturer obtains a patent. Is the resulting tying legal? Apparently this question has not been presented to the courts.

Producers are and probably must continue to be free to refuse to sell items separately.[50] Neither the Clayton Act nor the Federal Trade Commission Act purport to compel the watchmaker to sell his works uncased and the administrative difficulties inherent in any such compulsion are terrifying.[51] It must be remembered that every sale on credit is essentially a tied sale and while the centralization of credit extension in banks might be desirable from certain points of view, it is not a practical program in the present state of commerce.. That tying cannot be wholly eliminated, however, does not suggest that it should not be curbed where the evils flowing from it are clear. Thus, where tying operates as a "requirements" contract and injures established competitors,[52] or where it unduly confuses the picture of prices and cost and thus induces imperfect knowledge of the market—in these instances it should be possible to support vigorous repression of tying practices.

### *"Output" Contracts and Exclusive Areas*

In this day of chain stores the distributor may become dominant and exact from the manufacturer an "output" contract, whereby the latter's whole production comes into the distributor's hands. Thus a mail order house may agree to take, and a manufacturer of electric fans to furnish, the entire output of fans for several years. And even the humblest of retailers may be able to persuade a manufacturer to let him have an exclusive sales area. Thus it may be arranged that A's brand of sweaters is obtainable in Cleveland only at B's store. It will readily be seen that the exclusive sales area is a variety of "output" contract.

As to general output contracts, the test of legality appears to be that of monopoly. If the court feels that the contract is part of a scheme to corner a market, it will hold it illegal.[53] When the transaction appears to have been made in the normal course of business, it is likely to be held valid.[54] It would seem that a good deal should depend upon the term of

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[50]Federal Trade Comm. v. Paramount-Famous-Lasky Corp., 57 F. (2d) 152 (C.C.A. 2d, 1932); *cf.* Federal Trade Comm. v. Gratz, 253 U.S. 421, 40 S. Ct. 572, 64 L. ed. 993 (1920).

[51]*Cf. Fishing Tackle Industry Code* (August 19, 1933) III, 4 at note 39; Federal Alcohol Administration Act of 1935, 49 STAT. 977, 981 *et seq.* (1935), 27 U.S.C.A. § 205 (1926).

[52]That is, competitors in a field where competition is established. It is not suggested that the persons injured need themselves be established.

[53]Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 29 S. Ct. 280, 53 L. ed., 486 (1909); Barataria Canning Co. v. Joulain, 80 Miss. 555, 31 So. 961 (1902). *Cf.* Van Marter v. Babcock, 23 Barb. 633 (N. Y. 1857).

[54]Heimbuecher v. Goff Horner & Co., 119 Ill. App. 373 (1905); Sage v. Oil Country Specialties Mfg. Co., 134 Kan. 215, 5 P. (2d) 1091 (1931); *see* Virtue v. Creamery Package Mfg. Co., 227 U. S. 8, 32, 37, 33 S. Ct. 202, 57 L. ed. 393 (1913). *But cf.* Mich. Pub. Acts 1889, No. 225, Mich. Pub. Acts 1905, No. 229, MICH. STAT. ANN. (Henderson, 1938) § 28.825.

the contract. An arrangement to last half a year is substantially different from one to continue for a decade.[55] Two cases suggest the possibility that the addition of a requirements contract to the output contract may tend to make both legal under circumstances which would make each contract doubtful if viewed alone.[56] Such an arrangement may amount nearly to a vertical merger, and should be governed by much the same considerations.[57]

As stated above, the exclusive sales area is but a partial output contract.[58] And the courts, albeit inexplicitly, sensibly follow the same line of reasoning applied to output contracts in determining legality. Thus the courts have approved this arrangement as applied to areas the size of a city block,[59] a whole city,[60] a plantation,[61] a railway,[62] a state,[63] and the whole of one state and parts of two others.[64] But if there is a whiff of an attempt to corner, or "divide up the territory," particularly if it involves another producer, the arrangement may be found unlawful.[65] Generally, however, both courts and legislatures are friendly to the practice.[66] To couple it with a requirements contract, as is not unusual in commerce,[67]

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[55]*But cf.* Southern Fire Brick Co. v. Garden City Sand Co., 223 Ill. 616, 79 N. E. 313 (1906) (eight-year contract sustained).

[56]Pittsburgh Plate Glass Co. v. Paine & Nixon Co., 182 Minn. 159, 234 N. W. 453 (1931); Lewis v. Archbell, 199 N. C. 205, 154 S. E. 11 (1930).

[57]United States v. United States Steel Corp. 251 U. S. 417, 40 S. Ct. 293, 64 L. ed. 343 (1920). *Cf.* BURNS, THE DECLINE OF COMPETITION (1936) 431 *et seq.*

[58]*Cf.* Indiana Farmers' Guide Co. v. Prairie Farmer Co., 293 U. S. 268, 55 S. Ct. 182, 79 L. ed. 356 (1934); Lerner & Singer, *Some Notes on Duopoly and Spatial Competition* (1937) 45 J. POL. ECON. 145; CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1935) 62 *et seq.*

[59]Anderson v. Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911 (1898).

[60]Keith v. Hirschberg Optical Co., 48 Ark. 138, 2 S. W. 777 (1887); Superior Coal Co. v. Darlington Lumber Co., 236 Ill. 83, 86 N. E. 180 (1908); Roller v. Ott, 14 Kan. 609 (1875); Mar-Hof Co. v. Rosenbacher, 176 N. C. 330, 97 S. E. 169 (1918); Forrest Photographic Co. v. Hutchinson Grocery Co., 108 S. W. 768 (Tex. Civ. App. 1908).

[61]Redlands Fruit Co. v. Sargent, 51 Tex. Civ. App. 619, 113 S. W. 330 (1908).

[62]Lewis v. Weatherford Ry., 36 Tex. Civ. App. 48, 81 S. W. 111 (1904); Fort Worth Ry. v. State, 99 Tex. 34, 87 S. W. 336 (1905).

[63]*See* Newell v. Meyendorff, 9 Mont. 254, 261, 23 Pac. 333, 334 (1890).

[64]Houck v. Wright, 77 Miss. 476, 27 So. 616 (1900).

[65]Morey v. Paladini, 187 Cal. 727, 203 Pac. 760 (1922); Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558 (1876). *Cf.* Excelsior Motor Mfg. Co. v. Sound Equipment, Inc., 73 F. (2d) 725 (C.C.A. 7th, 1934); Pratt v. Marean, 25 Ill. App. 516 (1888).

[66]Coca-Cola Bottling Co. v. Coca-Cola Co., 269 Fed. 796 (D. C. Del. 1920); Pearsall Butter Co. v. Federal Trade Comm. 292 Fed. 720 (C.C.A. 7th, 1923); *see* Locker v. American Tobacco Co., 218 Fed. 447, 449 (C.C.A. 2d, 1914). *See also* Zellner Mercantile Co. v. Parlin Plow Co., 98 Kan. 609, 159 Pac. 391 (1916), involving Kan. Laws 1907, c. 139, § 1, KAN. GEN. STAT. ANN. (1935) c. 16, § 112; *see also* Commonwealth v. Strauss, 191 Mass. 545, 78 N. E. 136 (1906), involving Mass. Laws 1901, c. 478, 3 MASS. ANN. LAWS (1933), c. 93, § 1; Standard Electric Mfg. Co., 5 F.T.C. 376 (1923) *semble. But cf.* Cook Co. v. Page, 294 S. W. 934 (Tex. Civ. App. 1927). *See* Note (1927) 27 COL. L. REV. 838, 841.

[67]NEW YORK UNIVERSITY BUREAU OF BUSINESS RESEARCH, THE EXCLUSIVE AGENCY (1923) 4.

does not seem to alter this attitude[68] except in Texas,[69] where the combination of the two practices may add little to the condemnation of requirements contracts alone.[70]

It appears that the exclusive sales area arrangement produces a number of conveniences for the manufacturer, such as affording a place for the consumer to have the wares repaired,[71] which carry little threat of monopoly. It also appears that exclusive sales areas may amount almost to a commercial necessity in the launching of new products.[72] If this be the case, this arrangement should certainly be tolerated under such circumstances.[73]

Some years ago fears were expressed that exclusive sales areas encouraged retail price maintenance and eliminated price competition among retailers.[74] Now that the "fair trade" laws[75] encourage price maintenance this objection would seem to be removed: exclusive sales areas simply intensify the tendency to concentrate competition at the level of the producer rather than at that of the distributor. And self interest should prevent their causing serious inconvenience to the consuming public.

*Restricted Sales Area*

It will be rare that the grant of an exclusive sales area is not accompanied by a restriction upon the territory in which sales may be made.

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[68]Coca-Cola Bottling Co. v. Coca-Cola Co., 269 Fed. 796 (D. C. Del. 1920); Great Western Distillery Products, Inc. v. John Wathen Co., 10 Cal. (2d) 442, 74 P. (2d) 745 (1937); Brown v. Rounsavell, 78 Ill. 589 (1875); Wood Mowing Co. v. Greenwood Hardware Co., 75 S. C. 378, 55 S. E. 973 (1906); Standard Electric Mfg. Co., 5 F.T.C. 376 (1923) *semble*.

[69]Texas Brewing Co. v. Templeman, 90 Tex. 227, 38 S. W. 27 (1896); Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804 (1899); Henderson Tire Co. v. Roberts, 12 S. W. (2d) 154 (Tex. Comm. App. 1929); Manufacturers' Finance Corp. v. Fort Worth Paper Co., 68 S. W. (2d) 307 (Tex. Civ. App. 1933).

[70]It has been suggested that the combination should be less obnoxious than a "requirements" contract alone. For the combination negatives the monopolistic intent inherent in the "requirements" contract. National Industrial Conference Board, Public Regulation of Competitive Practices (1925) 185; *Note* (1925) 2 Harv. Bus. Rev. 485, 486.

[71]New York University Bureau of Business Research, The Exclusive Agency (1923) 12, 20. It is also said that credit problems are simplified (*Id.* at 16) and that that the reports furnished by such retailers are essential to careful planning of production in certain industries. Girdner, *Integrated Marketing Institutions*, 209 Annals of Cong. 55, 59 (1940).

[72]New York University Bureau of Business Research, The Exclusive Agency (1923) 11 *et seq.* The commercial cause is probably linked to the fact that the arrangement is rarely applied to unbranded goods. Note (1927) 27 Col. L. Rev. 838, 839.

[73]*Cf.* General Talking Pictures Corp. v. American Telephone & Telegraph Co., 18 F. Supp. 650 (D. C. Del. 1937).

[74]Note (1925) 3 Harv. Bus. Rev. 485, 489; New York University Bureau of Business Research, The Exclusive Agency (1923) 15; Note (1927) 27 Col. L. Rev. 838, 840.

[75]*E.g.*, 50 Stat. 693 (1937), 15 U.S.C.A. § 1 (1941).

Thus, the manufacturer of a motor car permits only A to sell his vehicles in the city of Philadelphia and at the same time forbids A to make sales in Harrisburg, where B has been given exclusive privileges. In the absence of special circumstances the courts seem inclined to approve the restriction,[76] albeit there is some dissent from this tolerance, largely based on statutes.[77]

Scant attention has been paid to the matter in the opinions, however, the courts usually laying stress upon other elements of control which are nearly always present. This habit may contain inherent soundness inasmuch as the restricted sales area works many of the effects of other controls, notably the exclusive sales area. For practical purposes, then, the restricted sales area presents few special problems and may be judged by the same criteria as the exclusive area.[78]

*Miscellaneous Controls*

There remain a variety of miscellaneous controls which producers seek to exercise over distributors. There are, for instance, attempts to restrain the user or alienation of chattels. Thus, the manufacturer of razor blades may forbid resharpening or disposal for resale. Of course the law generally frowns upon such restraints.[79] *A fortiori,* when the court suspects that the restraint may contain monopolistic features, it is coolly received.[80] In a number of rather specialized instances, however,

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[76]Federal Trade Comm. v. Curtis Publishing Co., 260 U. S. 568, 43 S. Ct. 210, 67 L. ed. 408 (1923); Phillips v. Iola Portland Cement Co., 125 Fed. 593 (C.C.A. 8th, 1903); A. B. Dick Co., 1 F. T. C. 20 (1917); Johnston v. Franklin Kirk Co., 83 Ind. App. 519, 148 N. E. 177 (1925); Rawleigh Medical Co. v. Osborne, 177 Iowa 208, 158 N. W. 566 (1916); McConkey v. Smith, 112 Kan. 560, 211 Pac. 631 (1923); Wood Mowing Co. v. Greenwood Hardware Co., 75 S. C. 378, 55 S. E. 973 (1906); Clark v. Crosby, 37 Vt. 188 (1864).

[77]N. C. Laws 1913, c. 41, § 5, N. C. Code Ann. (Michie, 1939) § 2563; Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804 (1899); National Automatic Machine Co. v. Smith, 32 S. W. (2d) 678 (Tex. Civ. App. 1930); Tex. Pub. Acts 1903, 119, Tex. Ann. Rev. Civ. Stat. (Vernon, 1939) Art. 7426. *But cf.* Crystal Ice Co. v. San Antonio Brewing Assc., 8 Tex. Civ. App. 1, 27 S. W. 210 (1894); Schow Bros., Inc. v. Adva-Talks Co., 232 S. W. 883 (Tex. Civ. App. 1921).

Special circumstances were present in Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 60 S. Ct. 618, 84 L. ed. 852 (1940) (allegation of general price fixing scheme); and Pratt v. Marean, 25 Ill. App. 516 (1888); National Skee-Ball Co. v. Seyfried, 110 N. J. Eq. 18, 158 Atl. 736 (1932) (restraints on user of chattels).

[78]It is to be noted that there are natural forces at work to restrict the sales area of certain retailers. Thus, the great mail order house may have customers in every state of the union; the local saloon's patrons are largely confined to its neighborhood.

Restriction of sales areas may also avoid the "basing-point" system of price quotation. Without going into the merits of this system, it may be remarked that it is largely confined to goods which are further processed before reaching consumers and, in addition, if the system is in need of curbing, it might well be reached by other methods.

[79]Gray, Restraints on the Alienation of Property (2d ed. 1895) § 105.

[80]Motion Picture Patents Co. v. Universal Film Co., 243 U. S. 502, 37 S. Ct. 416, 61 L. ed. 871 (1917); Merchants Legal Stamp Co. v. Murphy, 220 Mass. 281, 107 N. E. 969 (1915); *see* Chafee, *Equitable Servitudes on Chattels* (1928) 41 Harv. L. Rev. 945, 949 *et seq.*

courts have permitted such restraints. Protection of the public health, for example, has been held[81] to justify control of the handling of a dangerous fluid[82] and at times the courts have felt that such restraints were necessary to the protection of property rights of the producer.[83]

Today retail price maintenance is largely accepted and a producer may avail himself of statutory authority to fix the price at which his own product shall be offered to the consumer. But there is little in the statutes to suggest that this privilege extends to the wares of other producers; indeed, the statutes might be construed to forbid A, a manufacturer of tooth paste, to control the retail price of B's tooth paste, since thus B would be unable to fix the price himself. In practice, however, this control seems to be exercised occasionally[84] and has received the approval of the only court which appears to have met the problem.[85] Upon principle, however, there is nothing to be said in favor of this control. Patently it tends to prevent price reductions reaching the consumer and is as indefensible as an outright price-fixing combination of producers.[86]

Frequently a producer, while permitting the distributor to deal in rival products, seeks to have him "push" his own. Thus, the grocer may agree to fill all orders for canned soup upon which the customer designates no brand with A's product. The precise question of the legality of this practice does not appear to have been raised but the Federal Trade Commission has frowned on something closely akin to it[87] while the courts seem to approve an agreement by the distributor to carry a full stock of the producer's goods.[88] A division of opinion has been recorded as to

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[81]Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 37 S. Ct. 416, 61 L. ed. 871 (1940).

[82]*Cf.* Fosburgh v. California & Hawaiian Refining Co., 291 Fed. 29 (C. C. A. 9th, 1923).

[83]Meyer v. Estes, 164 Mass. 457, 41 N. E. 683 (1895); Coca-Cola Co. v. State, 225 S. W. 791 (Tex. Civ. App. 1920); Schow Bros., Inc. v. Adva-Talks Co., 232 S. W. 883 (Tex. Civ. App. 1921).

[84]*See* REYNOLDS, THE CONTROL OF COMPETITION IN CANADA (1940) 14.

[85]Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91 (1899).

[86]Another problem is raised when a producer attempts to keep prices of his own product in line with those of his rivals. Thus, a steel mill may contract to furnish a jobber's requirements for the coming year, the price to be that charged by a rival mill, the "price leader." In the single case which appears to have raised the question of the legality of this practice [Wiseman v. Dennis, 156 Va. 431, 157 S. E. 716 (1931)] it seems to have been assumed to be lawful, which would be natural in view of the general legality of the price leadership system. *See* United States v. United States Steel Corp., 251 U. S. 417, 419, 40 S. Ct. 293, 64 L. ed. 343 (1920); United States v. International Harvester Co., 274 U. S. 693, 708, 47 S. Ct. 748, 71 L. ed. 1302 (1927).

[87]Kinney-Rome Co. v. Federal Trade Comm., 275 Fed. 665 (C. C. A. 7th, 1921); Aeolian Co., 3 F. T. C. 124 (1920); *cf., e.g.,* Twinplex Sales Co., 11 F. T. C. 57 (1927).

[88]Peerless Pattern Co. v. Gauntlett Dry Goods Co., 171 Mich. 158, 136 N. W. 1113 (1912); Ripy & Son v. Art Wall Paper Mills, 41 Okla. 20, 136 Pac. 1080 (1913).

the legality of an agreement by the distributor to engage in no other business; that is, to devote his entire efforts to the retail store in which he sells the producer's wares.[89] These controls, albeit somewhat milder in form, have much the same effect as requirements contracts. If, therefore, such contracts are approved, so should these controls; if not, there is still ample room for their legality unless it can be shown that the practice actually tends to cut other producers off from the distributors.

Apparently no one has thought it worthwhile to raise the legality of a large number of other controls which are fairly common to commerce. It is said, for instance, that manufacturers of automobiles determine how many cars a dealer shall sell per month, how large an inventory he shall carry, how he shall service cars in use, how he shall keep his books, how he shall advertise and the location and appearance of his place of business.[90] Taken together, such extensive controls leave little discretion in the dealer, and must be tested by the criteria applicable to vertical integration generally.

*Application to Public Utilities*

Some surprising cases have dealt with the questions of control discussed above as applied to public utilities. For suppliers of transportation, water, electricity and so forth frequently reach the consumer through an intermediary who distributes the services or products. As to such distributors, it seems to be law that an exclusive sales area may be granted them by the producer,[91] a rule full of good sense. But the courts generally prohibit a public utility from making a "requirement" contract.[92]

Public utilities are not within the enterprise system. They belong in a world of public control of prices and service and not in that of compe-

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[89]Rawleigh Medical Co. v. Osborne, 177 Iowa 208, 158 N. W. 566 (1916); Rawleigh Medical Co. v. Marshall, 248 S. W. 153 (Tex. Civ. App. 1922).

[90]*Automobiles II—The Dealer* (Dec. 1931) 4 FORTUNE [No. 6] 38, 41; *See* REYNOLDS, THE CONTROL OF COMPETITION IN CANADA (1940) 90, n. 84; *cf.* California Automobile Dealers' Anti-Coercion Act of 1935, Cal. Laws 1935, 1755, CAL. GEN. LAWS (Deering, 1937) Act 5137.

[91]San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. 495 (1895); Lewis v. Weatherford Ry., 36 Tex. Civ. App. 48, 81 S. W. 111 (1904); Fort Worth Ry. v. State, 99 Tex. 34, 87 S. W. 336 (1905); *see* Chicago, St. Louis & New Orleans Ry. v. Pullman Southern Car Co., 139 U. S. 79, 89, 11 S. Ct. 490, 35 L. ed. 97 (1891). *But cf.* Landon v. Court of Industrial Relations, 269 Fed. 423 (D. Kan. 1920).

[92]United States Telephone Co. v. Central Union Co., 202 Fed. 66 (C. C. A. 6th, 1913); Landon v. Court of Industrial Relations, 269 Fed. 423 (D. Kan. 1920); Union Bank v. Kinloch Telephone Co., 258 Ill. 202, 101 N. E. 535 (1913). *Cf.* Central New York Telephone Co. v. Averill, 199 N. Y. 128, 92 N. E. 206 (1910); People *ex rel.* Perceval v. Public Service Comm., 163 App. Div. 705, 148 N. Y. Supp. 583 (1914) ("requirements" contracts by consumers). *But cf.* Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353, 51 S. Ct. 476, 75 L. ed. 1112 (1931).

tition and free markets.[93] Hence there can be no objection to a contract executed by a public service company on the ground that it restrains trade. At least the courts should leave such a determination in the first instance to the appropriate administrative authority exercising control over the utility under the mandate of the legislature.[94]

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Speaking generally, what special circumstances suggest the desirability of control over distribution? Aside from mere convenience to the producer[95] there are three types of cases in which special arguments can be advanced in support of control.

First, it may be said that the maintenance of quality demands the exercise of certain controls. The retailer, left to his own devices, might indulge in practices which would even threaten the public health. Thus, a packer might insist that meat sold by him be kept by the butcher in a refrigerator.[96] Of course this reason for control cannot be carried to the point where the authorities designated by the legislature to protect the public health are deemed impotent but it may carry considerable weight, particularly in the absence of greater control over quality by legislation.[97] It should be noted, however, that this justification is applicable only in a limited class of situations and to a limited type of control.

Second, it is urged that the exercise of certain forms of control enables the producer to protect something like a property interest. He may believe that control is necessary to maintain the reputation of his product in the public eye. Thus, in *Pick Manufacturing Company* v. *General Motors Corporation*[98] it was held that manufacturer of automobiles might

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[93]*Cf.* United States v. Trans-Missouri Freight Ass'n., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007 (1897) (applying the Sherman Act to railroads); Tex. Acts 1935, c. 44, Tex. Ann. Rev. Civ. Sat. (Vernon, 1939) Art. 7428a (prohibiting monopolization of public utilities).

[94]In Coombs v. Burk, 40 Cal. App. 8, 180 Pac. 59 (1919), for instance, it was held that a gas company might not make a gift of a gas stove on condition that the donee use only the company's gas therein. The evil here, if any, is that the patron pays for the stove month by month; that is, the payment for the stove is concealed in the gas rate. Rates and methods of payment are matters usually within the peculiar control of public utility commissions.

[95]George, *Manufacturers' Marketing Problems* (1940) 209 Annals of Cong. 30.

[96]*Cf.* Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 60 S. Ct. 618, 84 L. ed. 852 (1940). The packer's motives, in these days of advertising and direct relationship between producer and consumer are easily understood. *See* Chafee, *Equitable Servitudes on Chattels* (1928) 41 Harv. L. Rev. 945, 946 *et seq.;* MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

In Fosburgh v. California & Hawaiian Refining Co., 291 Fed. 29 (C. C. A. 9th, 1923) the court accepted the justification for a restraint on alienation that it was inspired by a desire to cooperate with the governmental food conservation measures. *But see* United States v. Socony-Vacuum Oil Co., Inc., 310 U. S. 150, 227, 60 S. Ct. 811, 84 L. ed. 1129 (1940).

[97]Such as the setting of standards of quality.

[98]80 F. (2d) 641 (C. C. A. 7th, 1935) *aff'd,* 299 U. S. 3 (1936).

insist that its dealers use only its own parts in making repairs to the cars. The court declared that this tying of the parts to the cars was reasonably necessary to maintain the manufacturer's good will with the public.[99] While there is without doubt a sound foundation for this reasoning, care must be taken that it is not carried too far.[100]

A recent decision takes an interesting stand on this issue.[101] It appears that the defendant was a pioneer in the manufacture of satisfactory apparatus for the recording and exhibiting of talking motion pictures. At stake was a revolution in the business of producing motion pictures; that is, if the defendant's product were accepted as satisfactory, all motion pictures might be made with sound, thus opening an extensive market for apparatus. The machines theretofore available, however, had not been satisfactory and had resulted in the general belief that motion pictures should not be accompanied by sound. Accordingly, defendant licensed picture producers to use its recording machines on condition that the reproducing apparatus used (in theaters) be of as good quality as that made and offered for sale by defendant—this condition was to be made part of the picture producer's contract with the exhibitor. Further, in theaters owned by picture producers themselves, amounting to some tenth of the national total, defendant's reproducing machines alone were to be used. Such machines were leased to the producers and other theater owners on condition that repair parts therefor be purchased solely from defendant. At this time defendant was supplying about a third of all the reproducing apparatus used in the country. Plaintiff was a rival manufacturer of apparatus and sought to enjoin the execution of contracts by defendant containing these controls. It appeared that the development stage in the manufacture of such apparatus had now been passed; that a number of competitors were making machinery as good as defendant's and that sound motion pictures had been generally accepted by the motion picture producers.

Under these circumstances, the court declared, the controls should no longer be permitted. But as to the pioneer stage, when the protection of the reputation of defendant's product was essential, the restrictions were valid. This, of course, is the doctrine *cessante ratione legis cessat ipsa lex* and seems well adapted to situations of this type.

A number of other types of quasi-property are said to require the protection of controls. Take, for instance, the well known *Saturday Eve-*

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[99] *Accord:* United Shoe Machinery Co. v. United States, 258 U. S. 451, 42 S. Ct. 363, 66 L. ed. 708 (1922); Mass. Laws 1907, 469, 3 Mass. Laws Ann. (1933) c. 93, § 1; British Patent & Designs Act, 1907, 7 Edw. VII, c. 29, § 38.

[100] International Business Machines Corp. v. United States, 298 U. S. 131 (1936).

[101] General Talking Pictures Corp. v. American Telephone & Telegraph Co., 18 F. Supp. 650 (D. Del. 1937).

*ning Post* cases.[102] A publisher organized an army of schoolboys into salesmen for its weeklies. Systematic supervision of the boys was provided on an extensive scale and a great deal of effort devoted to the development of the boys into efficient and reliable salesmen. Having gone to this expense, the publisher sought to protect his investment by forbidding the schoolboy salesmen to deal in rival publications. Since the organization was unique, competing publishers were put at a considerable disadvantage. It was held, however, that the restraints were valid, the courts agreeing that protection of the investment justified the control.[103] Similar decisions have been handed down when a trade-mark is involved. Thus it has been held that the owner of a trade-mark applied to a carbonated beverage may permit bottlers to use the mark on condition they purchase their requirements of syrup from the trade-mark owner, do not resell the syrup and do not deal in rival beverages.[104]

Now it would seem that if all this could be justified merely to protect a trade-mark, at least as much should be allowed to protect a patent. The law, however, (some early decisions being disregarded[105]), seems otherwise,[106] albeit the precise question does not appear to have been raised. Thus it is difficult to believe that the trade-mark cases are wholly sound, at least in the absence of a clear showing of probable prejudice to the producer's property interest. There can be little objection to the extension of the idea of property to intangibles but it does not follow that control over distribution is invariably necessary for the protection of such property. Even if necessary, there may exist serious doubts as to whether special distribution systems, trade-marks, patents and good will generally are of sufficient importance to justify the restraints.

Third, it may be urged that the exercise of controls alone can save certain independent distributors from oblivion. Such distributors, the

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[102]Federal Trade Comm. v. Curtis Publishing Co., 260 U. S. 568, 43 S. Ct. 210, 67 L. ed. 408 (1925); Pictorial Review Co. v. Curtis Publishing Co., 255 Fed. 206 (S. D. N. Y. 1917). *See* HENDERSON, THE FEDERAL TRADE COMMISSION (1924) 127.

[103]*Cf.* Meyer v. Estes, 164 Mass. 457, 41 N. E. 683 (1895); Schow Bros., Inc. v. Adva-Talks Co., 232 S. W. 883 (Tex. Civ. App. 1921).

[104]Coca-Cola Bottling Co. v. Coca-Cola Co., 269 Fed. 796 (D. Del. 1920); Coca-Cola Co. v. State, 225 S. W. 791 (Tex. Civ. App. 1920). *See The Coca-Cola Industry* (Dec. 1938) 18 FORTUNE [No. 6] 65, 106 for examples of further controls exercised by this producer.

[105]Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U. S. 325, 29 S. Ct. 503, 53 L. ed. 813 (1909); Westinghouse Electric & Mfg. Co. v. Diamond State Fibre Co., 268 Fed. 1921 (D. Del. 1920).

[106]Morgan Envelope Co. v. Albany Paper Co., 152 U. S. 425, 14 S. Ct. 427, 38 L. ed. 500 (1894); Carbice Corp. v. American Patents Development Corp., 283 U. S. 27, 51 S. Ct. 334, 75 L. ed. 819 (1931); Leitch Mfg. Co. v. Barber Co., 302 U. S. 458, 58 S. Ct. 288, 82 L. ed. 371 (1938); Radio Corporation of America v. Lord, 28 F. (2d) 257 (C. C. A. 3d, 1928); Oxford Varnish Corp. v. Ault & Wilborg Corp., 83 F. (2d) 764 (C. C. A. 6th, 1936). *But cf.* Sage v. Oil Country Specialties Mfg. Co., 134 Kan. 215, 5 P. (2d) 1091 (1931).

argument runs, have not kept pace with the rest of commerce in improving efficiency.[107] Unless guided by the producer they will be swallowed into giant vertical integrations[108] or forced to the wall by giant distributors.[109] It is true that there are valid objections to extensive vertical integration[110] but of course the controls themselves are but milder forms of such integration.[111] Besides, the economies effected by the giant distributors are attractive without—so far, at least—giving rise to monopolistic abuses.[112] Yet the giant distributors do not render the service and perhaps do not maintain the quality of the small, independent distributor. Again, this independent distributor may be thought worth preserving as a class in society.

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Some of the considerations suggested in this study are economic; others are political. They involve the appraisal of trends as well as of conditions, both of which may be obscure. Inevitably, courts and legislatures must work in much darkness. Tasks of decision and legislation, however, may not be shirked and it is only by reference to the actualities of commerce that good law may result.

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[107] TWENTIETH CENTURY FUND, DOES DISTRIBUTION COST TOO MUCH? (1939) 320 *et seq.*; *Automobiles II—The Dealer* (Dec. 1931) 4 FORTUNE [No. 6] 38, 41; Cherrington, *The Small Retailer: An Appraisal* (1939) 17 HARV. BUS. REV. 326.

[108] *Cf.* United States v. General Electric Co., 272 U. S. 476, 47 S. Ct. 192, 71 L. ed. 362 (1926); Girdner, *Integrated Marketing Institutions,* 209 ANNALS OF CONG. 55 (1940).

[109] Edwards, *The Struggle for the Control of Distribution,* 1 JOUR. MKTING 212 (1937).

[110] *See* BURNS, THE DECLINE OF COMPETITION (1936) 431 *et seq.*

[111] *Id.* at 426.

[112] *Klein's Store* (July 1932) 6 FORTUNE [No. 1] 54, 59; *S. S. Kresge Co.* (June 1940) 21 FORTUNE [No. 6] 70; *cf. American Radiator & Standard Sanitary Corp.* (March 1940) 21 FORTUNE [No. 3] 57, 118; *The Great American Salesman* (Feb. 1940) 21 FORTUNE [No. 2] 72.

# THE LIABILITY IN TORT OF COOPERATIVE POWER COMPANIES

*William N. Ethridge, Jr.**

" 'Cheshire-Puss,' she began rather timidly . . . 'Would you tell me, please, which way I ought to go from here?'

" 'That depends a good deal on where you want to get to,' said the Cat."†

Judicial decisions frequently move into conclusions which are unwarranted divagations from both socially desirable objectives and even sound legal precedent. Every lawyer has at one time or another wrestled vainly in an attempt to reconcile a desired and socially preferable conclusion in a case at hand with legal doctrines which are founded upon an earlier opinion whose *ratio decidendi* was at the time unjustified but whose theory is now "established law," whatever that transcendental phrase may mean. The small aperture has dissolved the entire viaduct into an unfordable stream of precedent.

*Arkansas Valley Cooperative Rural Electric Company v. Elkins,*[1] decided by the Supreme Court of Arkansas in 1940, is just such a case with equally ominious potentialities. But before examining its implications, it is necessary to survey its immediate background.

## I. *The Background and the Case*

The various legal doctrines centering around cooperatively operated "non-profit" associations or companies[2] have been crystalizing only within a few preceding decades. The past nine years have witnessed the acceleration of this movement; the New Deal has encouraged through Federal loans the development of district cooperatives made up of producers of various commodities, and, more importantly for the purposes of this discussion, of cooperatives of consumers for the purchase or generation and distribution of electric power. In their present form and mode of operation such organizations are of comparatively recent origin, but

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†LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (Modern Library ed. 1936) 71-72.

[1]200 Ark. 883, 141 S. W. (2d) 538 (1940).

[2]For purposes of this article these two words are used interchangeably. For example, a cooperative organized under the Arkansas Act is designated a company, under the analogous Mississippi Act an Association.

For general discussion see 1 FLETCHER, ENCYCLOPEDIA CORPORATIONS (Perm. ed. 1931) §§ 68, 109, 112; 16 *Id.* §§ 8285-8288; Ballantine, *Cooperative Marketing Ass'ns* (1923) 8 MINN. L. REV. 1; Hanna, *Cooperative Associations and the Public* (1930) 29 MICH. L. REV. 148.

their growth in numbers, membership, magnitude of operation, and economic importance has been great.

The purpose of a cooperative electric power company is to enable the consumer to secure electric power according to his demand and cheaply, by bringing the producer and consumer into a more direct relation. Naturally enough, the cooperative distribution of electricity was more or less forced into existence by the need of otherwise unserviced rural communities and the desire to secure electricity at a fairer price. This latter objective is primarily aided by the resulting elimination of unnecessary expenses.

The principle of joint distribution of electric power has been enacted into law by the Congress of the United States and by the legislatures of twenty-seven states. The Rural Electrification Administration, now under the United States Department of Agriculture, was organized in 1935, for the purpose of making loans to district power associations desiring to distribute electric power in their respective states.[3] These district associations had to be organized under state laws (since there existed no provision for their Federal incorporation), and this necessity resulted in the enactment, by the states interested in encouraging cooperative power distribution, of special legislation enabling the incorporation of "non-profit," cooperatively operated power companies. The majority of the twenty-seven now existing enabling acts were enacted by states in the South and Mid-West, where a predominantly rural and decentralized society emphasized the need for some kind of cooperative, Federally sponsored agency.

The Arkansas Electric Cooperative Corporation Act,[4] which is the one involved in the *Elkins* case mentioned above, and the Mississippi Electric Power Association Act[5] may be taken as typical examples of these statutes. Referring to them, and to the Mississippi legislation in particular, a spokesman for the Rural Electrification Division says that:

> "It is most similar to those acts which were adopted in the period from 1935 to 1937 and which are still in force in the

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[3]Executive Order 7037 of May 11, 1935; Rural Electrification Act of 1936, 49 STAT. 1363 (1936), 7 U. S. C. A. 901 *et seq.* (1939) (established REA on ten year basis). In 1941 REA was transferred by executive order to U. S. Dept. of Agriculture. See U. S. GOVT. MANUAL (1941) 375 *ff.*

"No money is actually advanced until REA is assured of (a) a self-liquidating project, (b) cooperation, or at least noninterference, of the state regulatory commission, (c) exclusive right of the borrower over the territory claimed, and (d) a source of wholesale power at reasonable rates." Dow, *Federal Administration of Rural Electrification* (1937) 31 AM. POL. SCI. REV. 1107, 1109; see also Baum, *Power District Legislation* (1937) 26 NAT. MUN. REV. 28; Cooke, *Municipalities and REA* (1936) 25 NAT. MUN. REV. 262.

[4]ARK. DIG. STAT. (Pope, 1937) §§ 2315-2351, 874-882.

[5]MISS. CODE ANN. (Supp. 1938) §§ 951-986, 321.

following states: Arkansas, Georgia, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, North Dakota, Pennsylvania, Texas, Virginia. It should be noted that the North Dakota act was amended in 1941. A group of states enacted model Rural Electric Cooperative Acts in 1939 and 1940 which are substantially similar in form. These states are: Alabama, Florida, Louisiana, Missouri, Montana, New Mexico, Oklahoma, South Carolina, Tennessee. The latest revision of the model Electric Cooperative Act was adopted in 1941 in Connecticut, Kansas, Maine and Maryland.

"In three states the general cooperative act was amended to provide specifically for cooperative and non-profit rural electrification: Illinois, New Hampshire, and South Dakota."[6]

With the operation of such companies being dependent upon REA loans, it would seem that all of the necessary enabling legislation would have been drafted *in toto* by the REA. But the first group of enabling acts enacted from 1935 to 1937 were not drafted by that body; occasionally the Tennessee Valley Authority and the Public Works Administration assisted in their preparation. However, early in 1939 a model Rural Electric Cooperative Act was prepared by the REA, which Act, with some later amendments, is now the draft approved by the REA and adopted in the more recent legislation.[7]

Because of the substantial uniformity of these acts, the popularity and scope of operation of these cooperative power companies organized under this type of legislation emphasizes their importance. For example, there are 22 electric power associations in Mississippi and, as of September 30, 1941, $11,333,453 had been allotted for loans to them to finance electrical distribution systems. These allotments were made to cover 12,895 miles of distribution lines to serve 50,689 consumers, and practically all of this mileage had been constructed and energized. Furthermore, 41,435 consumers were actually connected as of September 30, 1941, and, according to REA estimates, approximately 12 per cent of the total farms of Mississippi are so electrified.[8] These are potent

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[6]Quoted from a letter dated Dec. 12, 1941 to the author from Mr. Charles U. Samenow, writing for the Associate Solicitor, Rural Electrification Division of the U. S. Dept. of Agriculture.

[7]"Prior to the 1939 legislative session, a model Rural Electric Cooperative Act was proposed by the REA and made available to borrowers and others in states which did not have and which required legislation in order to permit formation of corporations which would be eligible and have power under state law to conduct a rural electrification program with financial assistance from the REA. Whenever necessary, the advice and assistances of the REA Legal Division was made available in conforming this model draft to the constitutional and statutory requirements of the state. . . . Late in 1940 another revision of this model act was made, the Electric Cooperative Act, which has been enacted with some variations in the four states above referred to." Samenow, *op. cit. supra,* note 6.

[8]Samenow, *op. cit. supra,* note 6.

and significant figures in either a rural or an industrial society; similar statistics are as important in many other states.

But the manifest economic and social significance of these associations is not the only consideration. Their rights and their responsibilities are of an equal or greater importance to persons having dealings with them and to strangers who may be affected by their actions. Hence in analyzing their status, two primary questions must inevitably arise; their contractual and their tort responsibility. The former, for all practical purposes, is similar to that of an ordinary business corporation: the grant of contractual power is usually sufficiently broad—the judicial rationals rendering the powers coextensive with the duties—and the element of estoppel would frequently be present. But the question of the tort responsibility of these cooperatives may conceivably be more doubtful. Apocryphal doctrines of the immunity of "non-profit" and of charitable corporations could intrude. Furthermore, the facts that these companies are organized under special state enabling acts and that they borrow their funds from a Federal agency may cause to be dragged out the old red herring of the tort immunity of a governmental instumentality.

Until last year no State or Federal appellate court had been faced with this problem, but in the first-impression *Elkin* case[9] the Arkansas Supreme Court, reasoning with all of the above mentioned theories, held that the Arkansas Valley Cooperative Rural Electric Company was not liable in tort to a stranger for the negligence of its agents. This decision may serve as a precedent for similar opinions in the twenty-six other states who have substantially similar legislation and may well have an appreciable effect upon the general field of law relative to cooperative associations.

The Arkansas Valley Company was organized under the Arkansas Act and operated in that state. George Elkins owned a farm over which the defendant company was going to erect electric light poles and lines. Wilson, an employee of the company, came to plaintiff's home and invited plaintiff to accompany him in a car which Wilson was driving to a point on plaintiff's property where they could discuss erecting the company's poles. Plaintiff got in the car for this purpose and, while Wilson was driving on a private road on plaintiff's farm, plaintiff asserted that Wilson drove so negligently that he ran the car into a tree stump and injured him. Judgments against both the defendant company and Wilson were rendered in the lower court. The Arkansas Supreme Court held that the defendant company was not suable in

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[9]Arkansas Valley Cooperative Rural Electric Co. v. Elkins, 200 Ark. 883, 141 S. W. (2d) 538 (1940).

tort for the negligence of its servants (despite the existence of the conventional "to sue and be sued" clause in the incorporating act), but sustained the judgment against Wilson personally. The court said that defendant company performed a governmental function under a special state enabling act, and that it was a non-profit-sharing corporation whose funds were in the nature of trust funds (raising one basis often assigned for a charitable corporation's immunity), and that therefore these funds could not be diverted by the claimed liability; for these reasons, the defendant company was not accountable in tort.[10] But what does the act under which the Arkansas Valley Company was incorporated say about this problem?

## II. *A Cooperative's Functional Status*

The Arkansas Act was enacted in 1937 and is rather typical of similar legislation in other states.[11] It provides that "cooperative, nonprofit corporations may be organized . . . for the purpose of engaging in rural electrification" by distributing electric energy, wiring premises, installing equipment, and furnishing such items to other corporations organized under this Act.[12] Section 2318 says:

> "Each corporation shall have power: (1) To sue and be sued, complain and defend, in its corporate name."

This language is assuredly clear and not subject to misinterpretation. It should necessarily include liability in tort for the negligence of its agents and employees. Furthermore, this conclusion is strengthened by Section 2342 (b) dealing with the dissolution of such corpora-

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[10]It should be noted that Elkins was held to be not a "guest" of Wilson. This enabled him to recover from Wilson personally and prevented his claim from coming within the inhibition upon tort actions in the Arkansas "Guest Statute." The Court said that Elkins was directly assisting Wilson in discharge of the master's business and that the ride was for the mutual benefit of both parties, since Elkins also was interested in placing the poles at a desirable spot. 200 Ark. 883, 141 S. W. (2d) 538, 542-543 (1940); see Payne v. Fayetteville Mercantile Co., 150 S. W. (2d) 966, 967 (Ark. 1941).

This reasoning is of course applicable only as between Wilson and Elkins. Since the latter was no servant or licensee of the company, for purposes of the subsequent discussion he is treated as a stranger to the company. If he were considered a servant or even a joint enterpriser, the company's argument claiming immunity upon the "non-profit" theory would be even weaker, as will later be seen.

[11]Ark. Dig. Stat. (Pope, 1937) §§ 2315-2351. (Hereafter this act will be referred to by sections alone.) For general discussions see Geffs and Hepburn, *Public Authorities and Cooperatives to Promote the Use of Electricity* (1937) 25 Geo. L. J. 827; Henry, *Rural Electrification in Illinois and Its Legal Aspects* (1937) 3 John Marshall L. Q. 179 (survey of general administrative problems); Bell, *Rural Electrification in Kansas* (1938) 7 J. B. A. Kan. 46 (benefits); Packel, *Utility Service to Cooperatives* (1938) 86 U. Pa. L. Rev. 370 (specialized problem, but indicates general theory of cooperatives); Edelman, *Power Projects Pay Tax Losses* (1941) 30 Nat. Mun. Rev. 478 (dislocation of state and local taxes resulting from entry of national government into field of public ownership of power).

[12]§ 2317.

tion. After the filing of the certificate of dissolution with the Secretary of State:

> "Such corporation shall continue for the purpose of paying, satisfying, and discharging any existing liabilities or obligations and collecting or liquidating its assets and doing all other acts required to adjust and wind up its business and affairs, and may sue and be sued in its corporate name. Any assets remaining after all liabilities or obligations of the corporation have been satisfied or discharged shall be distributed pro rata among the members."

This apparent declaration of the legislative intent that tort claims should be settled also is strengthened by those judicial opinions which interpret the word "liabilities" (in both its popular and its specific sense) as including torts as well as contracts.[13] The extensive powers given the cooperative in the other parts of the Act indicate rather clearly that the legislature intended to treat it as any other corporation. It cannot be fairly assumed, in the absence of an express denial, that a legislature intended to turn a corporation loose over the state with such extensive powers without also making it liable for the torts of its agents.

In most respects the Arkansas Valley's powers are similar to those of a regular business corporation. It has the power to acquire, hold, lease, and dispose of property, to render service and to operate electric systems within the State, to pledge all or any part of its revenue and property, to make any and all contracts necessary, to contract debts and issue bonds, to fix fees, rents, tolls, and other charges for its services, to deal in electrical and plumbing appliances, and to act through its agents.[14] It has the additional powers, similar to those of any public utility, of eminent domain and of use of highways for its lines. It has the further general power "to do and to perform . . . any and all acts and things, and to have and exercise any and all powers as may be necessary, convenient, or appropriate to effectuate the purpose for which the corporation is organized."[15] A broader grant of powers to a public utility could scarcely be drafted, and the combination of express language and the fair assumption that the legislature would naturally impose correlative duties would seem to reveal a clear legislative intent to establish tort liability.

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[13]Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. ed. 110 (1911); Brun v. Mann, 151 Fed. 145, 155 (C. C. A. 8th, 1906); Price v. Parker, 197 Mass. 1, 83 N. E. 323 (1907); Geigor v. Sanitary Farm Dairies, 146 Minn. 235, 178 N. W. 501, 502 (1920); Pacific Power & Light Co. v. White, 98 Wash. 19, 164 Pac. 602, 604 (1917); Cooper v. Utah Light & Ry., 35 Utah 570, 102 Pac. 202, 206 (1909); 4 Words and Phrases, 3rd Series (1928) 871.

[14]§ 2318.

[15]§ 2318 (19). § 2349 provides for a "liberal" construction of its terms.

There must be a board of directors elected annually by the members entitled to vote. The directors must be members and are not entitled to compensation for their services, but are entitled to reimbursement for expenses incurred by them in the performance of their duties. The powers of the board of directors are plenary.[16] All persons in rural areas are eligible for membership, but no one shall belong unless he uses the electric energy of the corporation.[17]

Section 2339 provides that

> "(a) Each corporation shall be operated without profit to its members but the . . . charge for electric energy and . . . equipment . . . shall be sufficient at all times.
>
> "(1) To pay all operating and maintenance expenses necessary or desirable for the prudent conduct of its business and the principal of and interest on the obligations issued. . . ., and
>
> "(2) For the creation of reserves.
>
> "(b) The revenues of the corporation shall be devoted first to the payment of operating and maintenance expenses and the principal and interest on outstanding obligations, . . ." [and then to necessary reserves].

Revenues not so required shall be returned to the members on a *pro rata basis,* either in cash or by rate reductions.

Operating and maintenance expenses arising from an inevitable, actuarial percentage of accidents to employees should be considered "necessary" and "desirable" for the "prudent conduct and operation" of a cooperative business. Expenses for tort liability are considered a necessary operating expense by many accountants, business corporations, and courts.[18] Moreover, the allowance of such claims as necessary expenses of operation would presumably be "necessary" in the sense that this type of enterprise could find few workers who would work on high power lines only at their own risk and with no right of compensation for the negligence of its employees and agents. The legislative intention to treat a power cooperative in most respects as it would any other public utility would seem to be manifest.

In summation, an examination of the statute under which the Arkansas Valley was created reveals two major facts relative to its liability

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[16] § 2337.
[17] § 2326.
[18] Bereth v. Sparks, 51 F. (2d) 441, 442 (C. C. A. 7th, 1931); Johnson v. Fontana County Fire Protection District, 101 P. (2d) 1092 (Cal. 1940); St. Louis Union Trust Co. v. Texas So. Ry., 126 S. W. 296, 300 (Tex. Civ. App. 1910); 1 WORDS AND PHRASES, 4TH SERIES (1933) 589; 3 WORDS AND PHRASES, 2D SERIES (1914) 748-749.

in tort: (1) Section 2318 expressly makes it liable "to be sued" without any limitation of any kind as to the type of liability.[19] (2) In numerous other parts of the Act this express language is strengthened by a clear and necessary implication of a legislative intention to deny it any immunity from tort liability.

The argument that it is not accountable must be based, however, unsubstantially, on that line of cases which holds that "a general grant of authority to sue a governmental subdivision or agency does not create any liability, and suit may be maintained thereunder only for such liability as is authorized, expressly or by necessary implication."[20] Such a contention is therefore based upon two premises: (1) That a cooperative power company is a governmental corporation and (2) that no express or necessarily implied intention to make it liable appears. Aside from the fact that the statute itself would seem to prove the second assumption incorrect, the argument must assume that such an organization is a governmental corporation performing a governmental and not a proprietary or corporate function. But is this accurate?

### III. *The Function as Governmental or Corporate*

In fine, is the Arkansas Valley so vitally connected with the state government that it should have the immunity of a state instrumentality?[21]

There are numerous cases dealing with the answerableness in tort of corporations organized under special state enabling statutes and the technique of determining whether they perform governmental or corporate functions. For example, in *State Highway Commission v.*

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[19]See Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 59 Sup. Ct. 516, 83 L. ed. 784 (1939).

[20]*E. g.,* State Highway Comm. v. Gulley, 167 Miss. 631, 647, 145 So. 351, 354 (1933).

[21]It might conceivably be argued, because a cooperative's capital is loaned to it by a department of the Federal Government, and because its assets and income are pledged to the department for repayment of the loan, that it is a Federal instrumentality immune from tort liability. But the immunity of the United States from suit has generally been denied to its corporate agents. Federal Land Bank v. Priddy, 295 U. S. 229, 55 Sup. Ct. 705, 79 L. ed. 1808 (1925); Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 59 Sup. Ct. 516, 83 L. ed. 784 (1939).

But the cooperative is not even created by the United States or by a U. S. corporation, it is organized under state laws. Further, to argue that, because it has pledged its assets and income, it is a Federal instrumentality is unsupported by any judicial precedent. If this were true, many hundreds of ordinary business corporations, whose assets and income are pledged to Federal loan agencies such as the RFC, would also have immunity from tort liability. It would be a *reductio ad absurdum* of the theory of governmental immunity. See Rural Electrification Act of 1936, 49 STAT. 1363 (1936), 7 U. S .C. A. § 901 *et seq.* (1939); U. S. GOVT. MANUAL (1941) 375 *ff.;* Borchard, *Governmental Responsibility in Tort* (1927) 36 YALE L. J. 575, 1039; McGuire, *Tort Claims Against the U. S.* (1931) 19 GEO. L. J. 133; Thurston, *Government Proprietary Cooperatives* (1935) 21 VA. L. REV. 465. Furthermore, even if the cooperative were a Federal corporation it would still be suable in tort under the doctrine of the *Keifer* case, *supra.*

*Knight,*[22] which was a suit for damages against the Highway Commission for negligently causing water to overflow on plaintiff's land, the court said:

> "In the absence of a statute so providing, a public corporation created *in invitum* and supported by taxation is not liable for damages caused by the negligent acts of its officers and servants; their negligent failure to discharge a duty imposed on the corporation by law, . . .; The doing by them of unauthorized acts, . . .; the negligent doing by them of authorized acts. . . ."

Since the highway commission was created involuntarily and was supported by taxation, it was a "public corporation" and was not liable because the statute did not expressly impose such liability. There the statute provided that the Highway Commission was a "body corporate" and that it could "sue and be sued," but the court's attitude was that the defendant was an arm of the government and, being an arm of the government, it must be made *expressly* accountable in tort in order to overcome the rule against the responsibility in tort of a governmental corporation. The highway commission was obviously and indisputably a governmental corporation. In the *Elkin* case the question was *whether or not* the Arkansas Valley was a governmental corporation.

The general rule in regard to the suability of corporations organized by the state is that a general statutory grant of authority to sue a governmental subdivision or agency does not create any liability, and suit may be maintained only for such liability as is authorized by statute, either expressly or by necessary implication.[23] In this line of cases it should be noted that the agency is clearly and admittedly governmental, and hence the court held that a general grant of power and liability to sue and to be sued was not enough. In none of them was it necessary for the court to discuss a technique for differentiating governmental and corporate functions.

Counties are clearly political subdivisions of the state, created for the purpose of discharging public duties, and it is settled that no suit can be maintained against a county for the negligence of its officers unless such liability is created by some statute, expressly or by necessary implication.[24] But even this strict rule has been relaxed somewhat, where

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[22]170 Miss. 60, 66, 154 So. 263 (1934).

[23]*See* State Highway Comm. v. Gulley, 167 Miss. 631, 647, 145 So. 351, 354 (1933), and the cases there cited.

[24]Redditt v. Wall, 99 Miss. 493, 55 So. 45 (1911); City of Grenada v. Grenada County, 115 Miss. 831, 76 So. 682 (1917); Pidgeon Thomas Iron Co. v. Leflore County, 135 Miss. 155, 166, 99 So. 677, 679 (1924); and see Simpson County v. Kelly, 175 Miss. 596, 166 So. 532, 534 (1936).

the court has deemed that the "private property clause" of a state constitution justified a liberal interpretation of a statute which might by implication be construed as imposing liability for damages incurred from building a highway so as to back surface water upon plaintiff's land.[25]

Necessarily recognizing that this doctrine is well settled, one must realize that such cases do not meet or answer the problem in the instant case, because (1) they admit the obvious fact that counties perform a necessary, governmental, public function, and (2) they require that therefore the statute must expressly or by necessary implication make the county liable for the tort of its agents. Fact (2) must be decided here only if Fact (1) is answered affirmatively, and Fact (1) is the problem in question at the present time.

Perhaps the only cases which adequately examine the differences between governmental and corporate functions are those dealing with municipal corporations.[26] The courts have generally made a distinction between counties and other municipal corporations, such as cities, towns, and villages. The principal ground upon which counties are not held amenable is that they are involuntary political divisions of the state, created for governmental purposes, and are organized without regard to the consent or dissent of the inhabitants. On the other hand, the theory upon which municipal corporations are held liable in such cases is that they are voluntary associations created and organized at the solicitation of and with the free consent of the inhabitants, and that the benefits accruing to the people by such incorporation compensate them for the liability.[27] There are three primary reasons for distinguishing the suability in tort of municipal corporations from the immunity of counties:

(1) Counties are involuntary political divisions of the state, created for governmental purposes, and organized without regard to the consent or dissent of the inhabitants, while municipal corporations are voluntary.

(2) The benefits accruing to the people by such incorporations compensate them for the liability.

(3) A suit against the county is, in effect, a suit against the state, whereas a suit against a voluntarily organized municipality is not.

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[25]Raney v. Hinds County, 78 Miss. 308, 28 So. 875 (1900); MISS. CONST. § 17.
[26]Board of Supervisors v. Payne, 175 Miss. 12, 166 So. 332 (1936). *See* 6 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1937) §§ 2972-2882; Vinsel, *Liabilities of Municipal Corporations in Mississippi* (1930) 3 MISSISSIPPI LAW JOURNAL 298, 304.
[27]Board of Supervisors v. Payne, 175 Miss. 12, 166 So. 332 (1936).

It will be subsequently noted that (1) above is one of the two major reasons given by the courts for exempting Drainage Districts and Boards of Levee Commissioners from liability for the torts of their agents. The other reason is that their funds are acquired by the taxing power, which is of course a governmental function.

However that may be, it would appear that the same reasons for distinguishing the immunity of counties from the suability of municipal corporations obtains in distinguishing the immunity of a state from the liability of a cooperative power company. The Arkansas Valley, like a city, was a voluntary association created and organized at the solicitation of, and with the free consent of the subscribers, under the laws of the state. Moreover, the benefits accruing to the members of the company by such incorporation compensate them for the liability.[28] If this rationale is true of a municipal corporation, certainly it is also true of a power cooperative. Furthermore, most municipal corporations are organized under some such enabling act as the Arkansas Valley was incorporated under. Assuredly a municipal corporation is more of a "political division of the state" than the Arkansas Valley, yet the former is in most courts suable for the negligence of its servants in all of its corporate functions.

Having approached municipal corporations from the way the courts have distinguished their liability in many instances from that of the immunity of counties, let us examine them from the point of view of what and why many of their functions have been designated corporate, and compare the principles derived therefrom with the problems in the *Elkins* case.

In the establishment and regulation of schools, hospitals, poor houses, fire departments, police departments, jails, workhouses, and the construction of buildings for those purposes, municipalities act in their governmental, and not their private capacity.[29] But it is sometimes difficult to determine in any particular case in what manner the municipality has acted. A municipality, in the exercise of its governmental or police powers, is clothed with a part of the sovereignty of the state; it is one of the state's governmental agencies. On the other hand, in the exercise of its non-governmental or private powers, the municipality stands as an individual or private corporation, so far as its acts are concerned.[30] In

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[28]Board of Supervisors v. Payne, 175 Miss. 12, 166 So. 332 (1936). See Feezer, *Tort Liability of Suppliers of Electricity* (1937) 22 WASH. U. L. Q. 357 (discusses tendency to exceed traditional tort relief and comments on ability to pay loss).

[29]Gulfport v. Sheppard, 116 Miss. 439, 77 So. 193 (1917); Hattiesburg v. Geigor, 118 Miss. 676, 79 So. 846 (1918); Jones v. City of Amory, 184 Miss. 161, 185 So. 237 (1939). *See* 6 MCQUILLIN, *loc. cit. supra* note 26; Vinsel, *loc. sit. supra* note 26.

[30]Bradley v. City of Jackson, 153 Miss. 136, 119 So. 811 (1928).

*City of Pass Christian v. Fernandez*,[31] where a child sued for injuries inflicted by a city garbage cart negligently operated, the customary approach was discussed:

> "It may be true as an abstract proposition of law, that damage occasioned by the city in the exercise of purely governmental duty does not render the city liable; but it *must be* a governmental duty. . . . It is a matter of no little difficulty to define what are and what are not purely governmental duties of a city. To a very large extent these questions can only be settled by the facts of each particular case, so variant are the conditions under which this question arises. The public or governmental duties of a city are those given by the state to the city as a part of the state's sovereignty, to be exercised by the city for the benefit of the whole public living both in and out of the corporate limits. All else is private or corporate duty, and for any negligence on the part of the agents or employees of the municipality in the discharge of any of the private duties of the city is liable for all damage just as an individual would be."

It should be noted that here the court took a strict view of what is a governmental function: it must be a governmental duty, and part of the state's sovereignty, exercised for the benefit of the whole public. "All else is . . . corporate duty." In short, it is submitted that the same criteria which the courts have adopted for determining whether a given function of a municipality is governmental or corporate should have been applied in the *Elkins* case.

(1) Are defendant's powers, under a strict interpretation, more closely related to those of a private corporation than to those of a sovereignty?

(2) Are its powers exercised for the benefit of the whole public or only for the benefit of the members of the corporation?

(3) Is defendant required by law to furnish power to the public, and is it a mandatory duty to maintain its facilities?

(4) Are its rights and powers permissive rather than mandatory?

In view of the close analogy of a municipality's functions to those of the immediate type of organization, it is interesting to note that the operation of an electric light plant by a city is considered by the majority of courts to be a corporate rather than a governmental function.[32] Hence

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[31] 100 Miss. 76, 81, 56 So. 329 (1911) (Italics added). See also Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1925); Meridian v. Beeman, 175 Miss. 527, 166 So. 757 (1936); City of Jackson v. McFadden, 181 Miss. 1, 177 So. 757 (1937).

[32] Yazoo City v. Birchett, 89 Miss. 700, 42 So. 569 (1906); Webb v. City of Owsego, 86 P. (2d) 553 (Kan. 1939); Terrell v. City of Washington, 73 S. E. 888 (N. C. 1912); City of Durant v. Allen, 168 Pac. 205 (Okla. 1917) (master-servant

taking the analogous standards which have been adopted for determining whether a municipality acts as an agency of the state or as a private corporation, and applying them to the question of whether or not a power cooperative such as the Arkansas Valley acts as an agency of the state, it is manifest that the latter is liable in tort.[33]

Furthermore, the Drainage District and Board of Levee Commissioners cases are definitely distinguishable on substantial grounds from the problems raised by a cooperative power company:[34]

(1) Drainage district funds are derived solely by taxation—it is itself a "taxing district." The cooperative receives no funds by taxation, but receives them through membership fees and charges for its services, somewhat as a normal public utility does.

(2) Drainage districts are created *in invitum* or involuntarily—that is, everyone in the district must pay the tax. Membership in the cooperative and use of its current is on purely a voluntary basis.

(3) A drainage district is a public corporation created for the purpose of discharging a public function, and serves the public health and convenience. A cooperant is, as has been previously discussed, more in the nature of a private corporation, and, although its services are beneficial to the public (as are those of any other privately owned public utility), it is assuredly not discharging a mandatory, necessarily public function.

Strangely enough, in the *Elkins* case the Arkansas court does not in its entire opinion analyze and discuss the problem of *whether or not* defendant company was exercising a public and a governmental or a corporate and proprietary function! True, on page 541 it says:

> "No provision is made for the creation of a fund out of which to respond for the tort of one of its members or employees and *unless there is a statutory liability,* in tort actions, appellant corporation cannot be held liable. . . . It cannot be

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case, dangerous instrumentality); Pool v. City of Cushing, 89 P. (2d) 294 (Okla. 1939); Christian v. City of New London, 290 N. E. 621 (Wis. 1940).

[33]*See* Yazoo City v. Birchett, 89 Miss. 700, 716, 42 So. 569 (1906).

[34]*See* Nugent v. Board of Miss. Levee Comm'rs., 58 Miss. 197, 219 (1880): "The difficulty has been to reconcile the taking of a fund donated or raised by taxation for a specific purpose, and appropriating it to the payment of damages arising from the wrongful acts of its managers with the just rights of the donors or tax payers." See also Stevens v. Beaver Dam Drainage Dist., 123 Miss. 884, 86 So. 641 (1921); Dick v. Atchafalaya Dam and Levee Dist., 147 Miss. 83, 113 So. 897 (1927); Sevier Lake Drainage Dist. v. Kinney, 153 Miss. 440, 121 So. 117 (1929); Bank of Commerce and Trust Co. v. Commissioners of Tallahatchie Drainage Dist. No. 1, 157 Miss. 336, 128 So. 91 (1930).

made to respond in tort in the absence of a statutory provision therefor."[35]

These italicized phrases would seem to impliedly admit that the court felt that these problems existed and subconsciously intruded. And from the above, one must infer that the court *assumed* that the defendant company was performing a purely governmental function, without analyzing whether it was or not. This deduction is further borne out by the fact that the court then immediately quoted a sewer district case, which quotation assumed that the district was a "public quasi-corporation"—and stated that there must be an express imposition of tort liability.[36] If the non-profit theory (which will be discussed subsequently) is adequate to decide the case, why should the court admit impliedly that the defendant was a quasi-governmental agency?

The assumption that the defendant was a governmental agency cannot and should not have been made with the Arkansas Valley, which is a comparatively new type of organization easily distinguishable from a drainage district; the status and the functions of the company must be analyzed in order to determine whether or not it is governmental or corporate. The *Elkins* decision did not do that at all.

The court in the *Elkins* case then proceeded, after these brief statements which assumed the defendant's public character, to cite principles dealing with non-profit, charitable corporations. These doctrines and their validity are not pertinent to the instant problem of whether defendant was functioning governmentally or municipally.

No doubt the reason (although not there mentioned) that the Arkansas Supreme Court did not consider whether defendant's functions were governmental or corporate was (1) that it assumed that the court's broad construction of what is a governmental function was well known, and (2) that its decisions relative to a municipality's functions, which (as previously discussed) bear such a close analogy to the instant problem, were known to reveal a very strict attitude toward answerableness in tort and a considerably more limited concept of what is a corporate, proprietary function, in the operation of which a municipality is liable for the negligence of its agents and employees, than the majority of other courts of this country. Applied to the problems of the instant case, the Arkansas Court and the majority of other tribunals have *opposing ideas* about what are the governmental and what are the corporate functions of a municipality, and therefore, presumably the nature

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[35]200 Ark. 883, 141 S. W. (2d) 538, 541 (1940). Note also the editor's syllabus No. 4, *Id.* at 883, 141 S. W. (2d) at 538.

[36]*Ibid.*

of the respective activities of a corporation organized under a special state enabling act. For example, the former adopts the minority rule which holds that the operation and maintenance of a water plant is a governmental and not a proprietary function.[37]

The Arkansas Court has recently (1) reiterated its established rule relative to the immunity of municipalities from tort liability, which is contrary to the general doctrine, and (2) indicated rather clearly that the *Elkins* case was decided upon the assumption the Arkansas Valley was acting governmentally. In *Patterson v. City of Little Rock*[38] the court said:

> ". . . It has been held in many similar cases that the city in the operation of water works, electric light plants, sewer systems, etc., is engaged in a governmental function and that an action for damages, based on the negligence of its officers and agents, cannot be maintained."

After this quotation the court cited three cases dealing with the Arkansas rule of immunity of municipalities and said:

> "In the last cited case it was said: 'that the operation and maintenance of the water plant by Little Rock was a governmental function, and not a proprietary activity, was the point expressly decided in the case of *Little Rock v. Holland,* 184 Ark. 381, 42 S. W. (2d) 383, . . .' See also . . .; *Arkansas Valley Cooperative Rural Electric Co. v. Elkins,* 200 Ark. 883, 141 S. W. (2d) 538, . . ."

Citing the *Elkins* case as a dictum for such rule is a rather obvious intimation that the court thought its concept of the nature of a governmental function was the controlling factor in the decision in the *Elkins* case.[39]

In summary, it is submitted that the governmental instrumentality theory of the *Elkins* case has no validity as a precedent in other states in cases involving similar cooperative power companies. The Arkansas Court simply omitted any discussion of one of the deciding issues; whether or not defendant was acting governmentally or corporately. It

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[37]Little Rock v. Holland, 184 Ark. 381, 42 S. E. (2d) 383 (1931) (*contra:* Yazoo City v. Birchett, *supra* note 33); Browne v. Bentonville, 94 Ark. 80, 126 S. W. 93 (1910); North Little Rock Water Co. v. Water Works Comm., 199 Ark. 773, 136 S. W. (2d) 194 (1940); Patterson v. City of Little Rock, 149 S. W. (2d) 562 (Ark. 1941).

[38]149 S. W. (2d) 562, 563 (Ark. 1914).

[39]Arkansas apparently has no Municipal Electric Plant Act, as has Mississippi. MISS. CODE ANN. (Supp. 1938) §§ 1012-1036. Under this Act it would be indeed strange for a Mississippi Court to hold a municipally owned utility liable for tort, but to hold a Municipal Power Association, organized under the above Act, immune. *See* Cooke, *Municipalities and REA* (1936) 25 NAT. MUN. REV. 262.

perhaps did this because it assumed that the defendant performed only governmental functions, and this assumption was based upon the established minority rule of Arkansas. Illustrative of the fact that this was the basis of the decision is the fact that the court cited drainage district cases dealing with governmental functions, and that in the recent *Patterson* case the court cited the *Elkins* case as dictum to support a holding that a municipality was not accountable for the negligence of its agents in operating a water-works plant. Because the general functional rule is diametrically opposite to that of Arkansas, in the close analogy of a municipality's utility plant and the resulting tort liability problem, there is indicated a different approach and attitude by the latter toward the economic, social, and individual issues involved, both in that problem and in the one under discussion.

State-encouraged social experiments such as are represented by these cooperatives have been especially popular within the past decade.[40] The advantages enjoyed by the corporate device and the participation of government in economic affairs have as yet produced few judicial decisions bearing directly upon the immediate problems raised in the principal case. Unfortunately no opinion appears to exist "on all fours" with the *Elkins* case but the legislative intention, the social implications, the individual unfairness of such a holding, and the basic legal principles involved point toward a denial of immunity. The writer has found only one case in which a court has dealt with problems substantially similar to those presented in the instant case.

This analogy, which incidentally was not mentioned in the *Elkins* case, was discussed in *Morrison v. Smith Bros., Inc.*[41] Plaintiffs there sued a "municipal utility district" for damages for the death of certain persons caused by the negligence of defendant's employees. Sustaining defendant's demurrer, the trial court held that it was not answerable in tort, since it was an agency of the State. The defendant was organized under a California statute designated the Municipal Utility District Act, which specified that it should have the power to sue and be sued, to hold property, and to operate light, water, heat, power, telephone, and other services for convenience of the people of the districts. It had power of eminent domain, could borrow money, levy and collect taxes, and do everything for the full exercise of its powers. Its board of directors was elected by the voters of the district. As in the instant case, the tort liability of such a corporation had never been determined by the appellate courts of that State.

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[40]See Field, *Government Corporations; A Proposal* (1935) 48 HARV. L. REV. 775.

[41]211 Cal. 36, 293 Pac. 53 (1930).

The California Court observed that it had already drawn a distinction between two different species of public corporations: (1) Municipal corporations, whose liability for tort depends on whether the work being done at the time the tort is committed is governmental or proprietary in its nature. (2) Irrigation, reclamation, or drainage organizations, whose main purpose is to assist the state in reclaiming, improving, and aiding the productivity of farm lands, and which are not liable for the negligence of their employees upon the theory that they are state agencies.

The court said that organizations of the nature of the Utility District were of relatively recent origin and could be referred to as "quasi-municipal corporations," since they were very similar to municipal corporations but radically different from state agencies, such as irrigation and reclamation districts.

> ". . . The purposes and means of operation are different. . . . These quasi-municipal corporations pay their way, first out of charges for services supplied, and, second, out of taxation by general assessment in the same manner as municipal corporations proper. State agencies, on the other hand, assess their costs according to the benefits conferred upon their individual property affected. . . .[42]
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> "Under such circumstances, we deem the better rule to be that, so far as tort liability is concerned, such liability is to be governed by the same rules as are applicable to municipal corporations proper. No good reason occurs to us why those districts should be cloaked with the immunity that respondent claims when acting in a purely proprietary capacity; and, in fact, many reasons exist why the same rule that applies to municipal corporations proper should apply to respondent. It would certainly be an anomalous situation if a municipality engaged in a proprietary function such as running, operating, or constructing water works, would be liable for torts of its agents, but if that same municipality should join with other municipalities, and organize a municipal utility district it would thereby immunize itself from all such liability. Such a rule does not appeal to our sense of justice nor to our reason. The rule excluding State agencies from liability from tort is an exception to the general rule which we are not inclined to extend. In so far as liability for tort is concerned, the respondent district is to be governed by these same rules as govern municipal corporations with reference to the same question—that is, respondent is liable for the torts of its agents if said torts are committed while the agents are acting in a proprietary capacity."[43]

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[42]211 Cal. at 36, 293 Pac. at 54.

[43]*Id.* at 36, 293 Pac. at 55. In Yolo v. Modesto Irrigation Dist., 216 Cal. 274, 13 P. (2d) 908 (1930), the doctrine of the *Harrison* case was reaffirmed and ex-

The enlarged scope of government activity and the encouragement of cooperative participation in economic affairs has greatly extended the use of the independent corporate device in attaining desirable social and economic ends and, consequently, corporate immunity from suit has been criticized and greatly limited. The extremely interpreted doctrine of governmental irresponsibility applied in the *Elkins* case, giving every conceivable activity the state simply encourages (as here) a privileged position, has not been followed by the majority of courts and has been particularly confined in the analogous utility activities for municipal corporations. It would seem that the reasons for this delimitation, which were approved in the *Morrison* case, should have obtained in the *Elkins* case, where there was a relatively slight relationship between the cooperative and the state. Moreover, the injustice to the injured person of a corporate immunity is an obvious, appreciable and humane consideration. The legal and social implications of the Elkins opinions make it an unfortunate decision by a Court which follows a minority rule relative to the tort liability of modern, business-like municipalities.

## IV. *The Non-Profit Theory*

The only remaining tenable theory which might argue unanswerableness in tort for the corporate type under discussion is the trust-fund doctrine, which was advanced in the principal case in this manner:

> ". . . appellant corporation, being a non-profit sharing organization and created solely for the benefit of its members, and not for profit, cannot be held liable in damages for injuries resulting from a tort of its employee. . . ."[44]

The general idea seems to be that a cooperative power company is a sort of charitable, non-profit corporation organized for one purpose, and that its funds can be used for that purpose only. Tort-immunity under this doctrine is then rationalized by setting up the well-worn trust-fund theory. Of course this assignment of a theory for a decision represents a conclusion rather than a rationale and is therefore logically unsound. But what are the sources, history, and appositeness of this principle, and how could it give immunity to the immediate cooperant?

The responsibility of a charitable corporation is best approached by delineating to whom the courts have held it liable. The weight of au-

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tended so as to hold liable in tort an irrigation district which was also operating an electric power line within and beyond its district and which was using only about twenty-five per cent of power generated and transmitted by it for surveying, drainage, and other irrigation district activities. The court points out again the analogy of the municipal corporation.

[44]Arkansas Valley Cooperative Rural Electric Company v. Elkins, 200 Ark. 883, 141 S. W. (2d) 538, 540 (1940).

thority is to the effect that a corporation created for the purpose of maintaining a public charity, the funds of which are derived from public and private donations for such purpose and are held by it exclusively for such purpose, is not liable to a beneficiary or patient for the negligence or wrongful act of its agents or servants, unless it has failed to use care in employing or retaining them. This doctrine has been applied to organizations for the purpose of maintaining hospitals and similar institutions, in actions against them by patients or other persons receiving treatment or care for injuries resulting from the negligence of a physician, nurse, or other attendant,[45] and to other charitable corporations, such as those for maintaining a house of refuge or an industrial school.[46]

On the other hand, it is generally held that a charitable corporation is responsible for injury to its servant through negligence in the performance of some duty owing to him.[47] The reason given for the preceding exemption—that to allow a recovery would tend to thwart the purposes of the trust—might with some logic be applicable where the person was at the time of the injury receiving the benefit of the charity, but it is illogical to hold a non-beneficiary bound by the will of the founder of the trust. As to a servant, this objection is usually recognized, but it is interesting to note that Mississippi has not passed upon this point.

The tort liability of a charity to strangers is more in doubt. The word "strangers" includes those persons not beneficiaries or servants of the fund. Generally speaking, a charitable body is not accountable to a stranger where it has exercised care and caution in the selection of its servants. But there is not a full immunity; liability exists (1) where there is negligence in selecting its servants, and (2) where it enters into a business apart from its charity, although with the purpose of securing the funds to be used in its charity.[48]

In view of these principles applicable to beneficiaries, patients, servants, and strangers of a charitable corporation, it is manifest that, even assuming a power cooperative were charitable, the plaintiff must be either a beneficiary or a stranger to be without a right of action: if the plaintiff is a servant of the cooperative and if it were a charity, it

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[45]McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. St. Rep. 529 (1876).

[46]Perry v. House of Refuge, 63 Ind. 20, 52 Am. Rep. 495 (1884); Williamson v. Louisville Industrial School of Reform, 95 Ky. 51, 24 S. W. 1065 (1894).

[47]10 AM. JUR., CHARITIES §§ 154, 703; Notes (1921) 14 A. L. R. 581; (1933) 86 A. L. R. 494; (1937) 109 A. L. R. 1201.

[48]Rhodes v. Millsaps College, 179 Miss. 596, 176 So. 253, 256 (1937): (1938) 11 MISSISSIPPI LAW JOURNAL 239; Gamble v. Vanderbilt Univ., 138 Tenn. 616, 200 S. W. 510 (1918); *cf.* Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930).

would indisputably be liable to him in spite of the "trust fund." However, the question is whether or not the functions and purposes of a cooperative power company are such as to bring it within this above mentioned, strictly limited immunity. If it is not, then it is necessary to determine whether the Arkansas Court in the *Elkins* case referred to some other doctrine to which the trust fund principle may with equal justification be applied.

What is a charitable corporation? Definition is difficult and would probably serve no practical end, but the following delimitation best expresses the scope of the term:

> "The word charity . . . has both a lay meaning and a legal meaning. In the common use of the term, charity means any act of kindness or benevolence, and it is usually defined as such by the lexicographers. . . .
>
> "In legal parlance the word 'charity' has a much wider significance than in common speech. . . . The most comprehensive and carefully drawn definition is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."[49]

It is obvious that a cooperative power company is not a purely charitable corporation. Its purposes are not "charitable" in the usual sense of the term, and its subscribers would probably be justifiably indignant if they were called recipients of charity. It is a sort of mutual benefit society organized solely for the welfare of its members and subscribers. Moreover, the scope of the term is strictly limited: To come within this rule of immunity it should be emphasized that a corporation must be a *purely charitable* body.[50] Accordingly the rule does not apply to a cemetery association[51] nor to a Young Men's Christian Association.[52]

Closely allied to and dependent upon this idea is the doctrine of the "trust-fund" and the exemption of a "non-profit" fund from tort claims. This is usually applied in cases involving mutual-benefit, medical-treatment funds collected from the wages of the employees of the corpora-

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[49]10 Am. Jur., Charities 584, 585; Words and Phrases, 5th Series (1939) 639 *et seq.*

[50]Newcomb v. Boston Protective Dept., 151 Mass. 215, 24 N. E. 39 (1890); 7 Thompson, Corporations (3rd. ed. 1927) 302-303.

[51]Donnelly v. Boston Catholic Cemetery Ass'n, 146 Mass. 163, 15 N. E. 505 (1888).

[52]Chapin v. Holyoke YMCA, 165 Mass. 280, 42 N. E. 1130 (1896); *See* Harden v. Salvation Army, 199 N. Y. 233, 92 N. E. 626 (1910).

tion which is being sued by an employee, and beneficiary of the fund, for the tort of a doctor or other agent chosen by the company to act with this fund. Since the charitable-corporation doctrine cannot justify the use of the trust-fund theory in a situation such as the *Elkins* case, perhaps this former line of cases may furnish some basis for its application. An examination of the reasons which have been assigned for the exemption of a non-profit charity and a comparison of these reasons with the above-mentioned decisions and with the *Elkins* case may throw some light upon the appositeness of the trust-fund principle.

The attempt to find a public policy extending immunity to a charitable corporation for the torts of its agents has been justified on several theories. One is that trust funds should not be diverted from the charitable purposes designated by the donor.[53] Still another is that the rule of *respondeat superior* is itself based on public policy and that this is an exception to foster public charity and preserve its benefits for the public.[54] Another theory is that of "implied assent" or assumption of risk. By this the beneficiary or the charity is held to assume the risk of injury through the negligence of servants by accepting the benefits of charity.[55] It is obvious that the so-called trust-fund theory is not applicable in the instant case, because no charitable purposes were designated by the donor. Moreover, consistent application of it would prevent recovery upon any cause of action against the corporation. The policy underlying this principle is that the preservation of such funds is more desirable than a right to compensation for an injury inflicted by the operation of the charity; it has been criticized severely and has been held no longer to have a footing in the English law, where it was originally advanced. Furthermore, it has been disapproved by several American courts. The purity of a charity's aims does not justify its torts.[56]

There is no basis for an implied-assent or assumption-of-risk theory. This exception applies only to a patient or other beneficiary of a charity, and a stranger or servant would not come within this classification. No reason exists for inferring that Elkins, for example, consented to waive any rights against the defendant. The immunity, an exception to the rule of *respondeat superior,* should be strictly limited. It is often stated that public policy demands the exemption, but this involves a determination of what is the best policy, which is the question at issue. Certainly a mutual-benefit power cooperative should not be allowed to inflict an irreparable injury in order to confer a benefit upon subscribers to the association.

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[53]Abston v. Walden Academy, 118 Tenn. 24, 102 S. W. 351 (1907).

[54]Vermillion v. Women's College of Due West, 104 S. C. 197, 88 S. E. 649 (1916).

[55]See Powers v. Mass. Homoeopathic Hospital, 109 Fed. 294, 300 (1901); 10 AM. JUR., CHARITIES 691-700 (discussing these theories).

[56]See 10 AM. JUR., CHARITIES 696, 702.

But what about the cases holding mutual-benefit medical associations immune from tort liability? Were they not non-profit and was not the trust fund theory there applied? Mississippi has two typical examples of this line of decisions. In *Eastman Gardiner and Company v. Permenter*[57] plaintiff worked as a laborer for defendant lumber company. Defendant each month took $1.00 out of each employee's wages, including plaintiff's, in order to pay a doctor to attend to all the medical needs of its laborers and their families. Plaintiff's sons became infected with what appeared to be an incurable disease, and the doctor, employed by defendant with the funds collected from the plaintiff and the other employees, treated them, but, it was alleged, did so negligently. The Court held that the defendant company exercised care in selecting the doctor, and that hence the trial court should have given a peremptory instruction for the defendant, who received no profit from the fund collected but who devoted it to medical services. It was said that "where the master administers the fund collected for the benefit of employees and receives no profit from it himself, he is not liable for the negligence of a doctor if he has exercised care in picking him."[58]

*James v. Yazoo and M. V. R. R.*[59] involved a similar problem and followed the *Permenter* case. In the *James* case the defendant railroad company operated a hospital supported by deductions from its employees' salaries. Plaintiff, who was an engineer employed by defendant, got a cinder in one eye and went to this hospital. He subsequently lost his sight in that eye and sued the defendant railroad company for the negligence of its agents in its hospital and for negligence in providing inadequate equipment for his care. The court said that the evidence was not adequate to show that the defendant did not use care in selecting competent medical officers for the hospital. It also cited the *Permenter* case and designated it as controlling.

These two cases did not involve the question of the defendant's tort liability to a stranger or to a servant working for the fund or society itself, but in both of them the plaintiffs were beneficiaries of the fund and had contributed to it. The immunity may be said to have arisen "under circumstances very similar to an actual contractual freedom from responsibility."[60] In the *James* case plaintiff sued the railroad for the

[57]111 Miss. 813, 72 So. 234 (1916).
[58]*Id.* at 818, 72 So. at 235.
[59]150 Miss. 776, 129 So. 819 (1929).
[60]See 10 Am. Jur., Charities 704; Arkansas Midland R. R. v. Pearson, 98 Ark. 399, 135 S. W. 917 (1911); Nicholson v. A. T. & S. F. Hospital Ass'n., 97 Ky. 480, 155 Pacific 920 (1916); Baden v. Atlantic Coastline R. R., 152 N. C. 318, 67 S. E. 971 (1910); Texas C. R. R. v. Zumwalt, 103 Texas 603, 132 S. W. 113 (1910); Note Ann. Cas. 1913 E. 1130.
Moreover, there is a "small minority view reaching a contrary conclusion, holding that liability exists on the theory that such an institution is not a charitable one." Phillips v. St. Louis and S. F. R. R., 211 Mo. 419, 111 S. W. 109 (1908).

negligence of its agents working in the hospital. It should be noted that, if the hospital doctor and technician were agents of the railroad, they were, by the same token, just as much agents of the plaintiff and other contributors to the fund. Expressed differently, the plaintiff and the defendant were somewhat in the nature of joint enterprisers, with plaintiff contributing his money and defendant its time and intelligence to see that the hospital operated properly. The *Permenter* case, like the *James* case, involved a sort of joint enterprise; moreover, the doctor was not an agent or employee of the defendant company except in a very limited sense of the word. The company was perhaps in the nature of an agent of its employees to hire a physician, who was at least as much an agent of the servants as he was of the company. There was between the doctor and the defendant no relation of employee and employer as there was in the *Elkins* case.[61] The theory of assumed risk might almost apply. Moreover, no question arose in either as to defendant's answerableness to a stranger or servant working for the fund itself, as distinguished from liability to one of the company's employees contributing to the fund.

The only argument upon which the non-profit theory could possibly give the Arkansas Valley an exemption is that it would foster public charity or welfare and preserve its benefits for the public. But the contention is extreme upon its face. No public charity is being fostered at all; the public is not benefited by denying the plaintiff a remedy for the wrong done him. It would assuredly be a remarkable policy which deprives a stranger or servant of a remedy for an injury done him by a corporate body which must necessarily act through numerous agents and employees, which uses in its operations an exceptionally dangerous instrument, and which benefits only the subscribers to the company.

The application of the trust-fund theory in the *Elkins* case appears to have been based upon inadequate precedents and a misapprehension of the questions and principles involved. For example, the court observed that no fund was created out of which defendant could respond for torts, and cited a sewer district case dealing with an admittedly governmental function.[62] It then advanced its theory for non-profit-sharing corporations and cited three cases to support the applicability of the doctrine to the case it was considering. No other reasons were given for

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[61]"A physician cannot be regarded as an agent or servant in the usual sense of the term, since he is not and necessarily cannot be directed. . . ." Arkansas Midland R. R. v. Pearson, 98 Ark. 399, 135 S. W. 917, 920 (1911).

[62]200 Ark. 883, 141 S. W. (2d) 540, 541 (1940); Board of Improvement of Sewer District No. 2 v. Moreland, 94 Ark. 380, 127 S. W. 469 (1910).

using this theory. What do these cases actually hold, and do they provide such a sufficient basis for the *Elkins* decision as to make it a valid precedent?

*Chamber of Commerce of Hot Springs v. Barton*[63] involved a suit by the Chamber to cancel a contract for sale of a radio station owned by it. The contract was made by the Board of Governors of the Chamber and the question involved was the power of the Board to sell the radio station, which power was upheld by the court. The citation in the *Elkins* case of this opinion[64] referred to a dictum of the court not necessary to the decision. Moreover, it involved no question of a cooperative's liability to a stranger or servant for an employee's negligence. In *Fordyce and McKee v. Women's Christian National Library Association,*[65] which the court also cited, it was expressly ruled that the defendant was a "charitable trust."[66] The problem there presented was the immunity of a charity's property from sale under execution on a tort judgment, and naturally it had no applicability to the *Elkins* case, where no charitable corporation was involved.

On page 541 of the *Elkins* case the Court stated that the "principles of law . . . announced" in *Flueling v. Goeringer*[67] were "sound and apply here." Hence it must be assumed that the Court based the validity of its reasoning upon that case. In the *Flueling* case the deceased was struck by a cab driven by Goeringer, and deceased's administrator sued Goeringer and the Checker Cab Company to recover damages. The Company was organized under a special Michigan statute authorizing "corporations whose purposes do not include the transaction of commercial or other business for a direct pecuniary profit to the members or stockholders." The Company did not own and operate a taxicab business, but only served as a medium for promoting and regulating the individual cab service rendered by its members. One hundred and ninety owners of taxicabs were members, each having paid $150 to become such, and each paid $15 per month for the service rendered by the Company: the transmission of cause for desired taxicab service, the fixing of uniform rates, etc. Each member owned his equipment and collected and kept, without any accounting to the Company, all his earnings. Holding the Company immune from suit but Goeringer liable, it was concluded that:

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[63]195 Ark. 274, 112 S. W. (2d) 619 (1938).
[64]200 Ark. 883, 141 S. W. (2d) 540, 541 (1940).
[65]79 Ark. 550, 96 S. W. 155 (1906).
[66]*Id.* at 550, 96 S. W. at 156.
[67]240 Mich. 372, 215 N. W. 294 (1927); see also Flueling v. Blue Ribbon Auto Driver's Ass'n, 247 Mich. 620, 226 N. W. 658 (1929) (where plaintiff recovered from cab driver's surety).

> "The law permitting corporations not for pecuniary profit admits of no business gains from which judgments in actions like this can be satisfied, and the company can not turn the dues of the members to such a purpose, for the dues are devoted to a service from which the members derive no pecuniary gain. We must hold that the Checker Cab Company, existing as a non-profit corporation, is not liable to respond to damages for the tort of Goeringer."[68]

This type of rationale could manifestly provide no valid precedent for the *Elkins* case. The Michigan court cited not one case or authority to support its decision, and apparently relied upon interpreting the particular Michigan statute dealing with non-profit corporations. The Cab Company was not organized under a special enabling act, as was the Arkansas Valley. No reasons were given for the Court's decision, and there was no element of a quasi-governmental or proprietary function of a state-encouraged corporation. Most important, in the *Flueling* case there was no problem of *respondeat superior* and no relation of master and servant as there was in the principal case, where plaintiff was injured by a servant's negligence.[69] Wilson was the servant of the Arkansas Valley; the taxi driver, Goeringer, who was the actual tort feasor, was no servant or agent of the Cab Company, and accordingly the Company was not liable for Goeringer's negligence with his cab. On the other hand, Wilson was a necessary agent of the cooperative and the rule of *respondeat superior* should logically obtain.

Several conclusions may be drawn from the preceding discussion. A survey of the authorities discloses no case or theory which would logically hold a cooperative power company to be a purely charitable corporation. On the contrary, they indicate that it is not. Hence these agencies cannot be brought within that strictly limited immunity from tort liability. Furthermore, no other accepted and applicable doctrine of immunity uses the trust-fund theory. The cases involving mutual-benefit, medical-treatment funds of an employees' association involve factual situations and questions of policy different from those of the principal case. In the former, the circumstances are very similar to an actual contractual freedom from responsibility: the plaintiffs are beneficiaries of the fund, and in the nature of joint enterprisers. No problem arose of injury to a stranger or a servant of the joint enterprise itself. The decision in the *Elkins* case ignored these distinctions and cited cases which

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[68]Flueling v. Goeringer, 240 Mich. 372, 215 N. W. 294, 295 (1927).

[69]This latter distinction is recognized by the new *Corpus Juris Secundum* as particularly significant. Commenting on the *Flueling* case, it says: "Non-profit membership corporation serving as a medium for promoting and regulating individual cab service was not liable for tort of its members, since relationship of master and servant or principal and agent does not exist between them." 19 C. J. S. § 1260, n. 75.

were inapposite. The *Flueling* case, followed in the Arkansas opinion as controlling on the non-profit theory, is clearly distinguishable, since no relation of master and servant existed between the company and the actual, immediate tort-feasor, and thus the former was no valid precedent for the latter, where the immediate tort-feasor was admittedly a servant of the company.

From the point of view of social and economic policy, a cooperatively operated power company is in a better position to stand the loss through a normal corporate liability than is an injured individual. Since the corporation is trading in a dangerous instrumentality and of necessity is using agents and servants to execute its purposes, a fair concept of justice should not deny a stranger or a servant not a beneficiary the right of redress.

## V. *What Price Irresponsibility?*

To paraphrase the Cheshire Cat, the way the law should tend depends a good deal on where it wants to get to. The conclusion must depend upon the major consideration: the social and economic ends which are to be sought and which are to direct the route taken toward the ideal of preserving the best interests of a whole society.

Because of predilections and of fixed principles, the judiciary and the legal profession have generally failed to keep pace with social and economic developments; hence the increasing legal recognition of the significance of the cooperative movement is gratifying. In furtherance of this trend, the courts may reasonably be expected to construe liberally these power cooperative acts in order to accomplish the objects for which they were intended, just as they have liberally construed the acts relating to cooperative marketing associations.[70] But the liberal interpretation should not be confused with a denial of fundamental rights and liabilities:[71] One would not suppose, if all public utilities were state-owned and operated, that they would be free from responsibility for the negligence of their agents.

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[70]Note (1934) 98 A. L. R. 1408.

[71]If a statutory immunity from tort liability should be construed, it might be contended that the statute violates the usual Bill of Rights provision in most state constitutions providing for open courts and insuring a remedy for injuries to persons and property. *E. g.,* MISS. CONST. § 24. This is called one of the "most sacred and essential of all constitutional guarantees" and declaratory of fundamental principles. Conley v. Conley, 92 Mont. 425, 15 P. (2d) 922 (1932); 16 C. J. S. 1493. It is interpreted in many jurisdictions to preserve the common law rights of action for injury to person or property to the extent of prohibiting the legislature from absolutely abolishing or denying a common law remedy for injuries to person or property. Stewart v. Houk, 127 Ore. 589, 271 Pac. 998 (1928); Mattson v. Astoria, 39 Ore. 577, 65 Pac. 1066 (1901); *In re* Opinion of Justices, 211 Mass. 618, 98 N. E.

Certain very obvious facts must be remembered: That men in general are not uniformly careful, that experience has shown that negligence—the failure to exercise ordinary care—is to be expected when men engage in industrial pursuits, and that it is necessary to operate through the agency of man. The participants and subscribers in a cooperative power company, for example, are not ignorant of these facts, and are presumed to have organized the company and contributed their funds, knowing that they might be required for the liquidation of claims in tort, as well as for their claims in contract, incurred in carrying out the purposes of the organization.

While the public has an interest in a cooperative type of organization such as the power company, it also has an interest in obliging every person and corporation which undertakes the performance of a duty to perform it carefully, and to that extent, therefore, it has an interest against exempting any person or any such corporation from liability from its negligence. Moreover, it is solely for the legislature, and not for the courts, to say that the former interest is so supreme that the latter must be sacrificed to it.[72] The wisdom of exempting a charitable corporation from liability in tort even to its beneficiaries is not entirely free from doubt. But to extend the exemption beyond the scope of established precedent and rule to a corporation which is not even charitable, so as to leave the defendant free from responsibility to all persons, is to place an institution above the law, which can be of advantage neither to the public nor to the company itself.[73]

As early as 1903 Maitland demonstrated that the trust has served historically as a screen to promote the growth of institutions which, for

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337 (1912); Noonan v. City of Portland, 161 Ore. 213, 88 Pac. (2d) 808 (1938); Batdorff v. Oregon City, 53 Ore. 402, 100 Pac. 937 (1909). But where a substantially adequate remedy remains or is substituted, the guaranty is unaffected. Humphrey v. Portland, 79 Ore. 430, 154 Pac. 897 Tex. Comm. App. (1916). See also City of Amarillo v. Tutor, 267 S. W. 697 (1924); Randolph v. Springfield, 302 Mo. 33, 257 S. W. 449 (1923); Hanson v. Krehbiel, 68 Kan. 670, 75 Pac. 1041 (1904); Clem v. Evans, 291 S. W. 871 (Tex. Comm. App. 1927).

The *Elkins* opinion did not discuss the Arkansas clause. ARK. CONST. Art. II, § 13. No Mississippi cases apply the provision to a statute denying a common law action in tort. But ETHRIDGE, MISSISSIPPI CONSTITUTIONS (1938) 123-125, indicates that he thinks the guaranty would apply. *Cf.* Commercial Bank v. Chambers, 8 Sm. & M. 9, 56, 58, 59, 61 (Miss. 1847); Coffman v. Bank of Ky., 40 Miss. 29, 36-37, 38 (1866); Brown v. Board of Levee Comm'rs., 50 Miss. 468, 487 (1874); Musgrove v. Vicksburg and Nashville R. R., 50 Miss. 678, 684 (1874); Covington County v. Watts, 120 Miss. 428, 82 So. 309 (1919); Rainey v. Hinds County, 78 Miss. 308, 315, 28 So. 875, 876 (1900); Meeks v. Meeks, 156 Miss. 638, 643, 126 So. 189 (1930); see also Byrd v. State, 1 How. 163, 181-182 (Miss. 1834); Randolph v. Springfield, 302 Mo. 33, 257 S. W. 449, 452 (1923).

[72] *See* Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675 (1879).

[73] Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294 (C. C. A. 1st, 1901), *cert. denied* 183 U. S. 695, 22 Sup. Ct. 932, 46 L. ed. 394 (1901).

various reasons, have found inadvisable the path of corporate adventure.[74] This tendency has been especially unfortunate in the realm of charitable trusts. Furthermore, the doctrine that a charity's funds should not be used to liquidate damages it has caused has not been worked out with entire consistency in other parts of our law, since a charitable institution is liable in an action for breach of contract.

However, it is not necessary to enter into a fairly well settled field of law to agree with these conclusions. Aside from the fact that power cooperatives are organized under a state statute and perform a corporate function and therefore should be liable just as a municipally controlled electric-light plant would be, an assertion of immunity from tort liability involves a whole series of assumptions. It starts out from the belief that the cooperative is in a different position from other corporations for tort liability from the fact that its purpose is not, strictly speaking, to put a profit in the pockets of its subscribers. But this entirely ignores judicial precedents and the administrative aspect of the problem. To fulfill the purposes of this type of organization involves all the usual features of an ordinary corporate enterprise. It acts by agents and servants. It harms and benefits third parties exactly as they are harmed or benefited by other institutions.

Where fault is involved, it is difficult to see why the exemption for charities, which itself is subject to exceptions, should have been broadened to cover the hitherto undecided problems raised in the *Elkins* case. It is small comfort to a person, injured for life, to know that he, by not recovering for the negligence of the cooperative's agents, is maintaining the funds of the company as a "trust fund" for subscribers. To him the case is simply one of injury. The thing which the law ought to take into account is surely the balance of interests involved, and the cooperative is far more likely to look to the conditions of its lines if it pays the penalty of its negligence, than if it saves a certain percentage of its income and reduces thereby its indebtedness and its rates. It would be an illogical situation if the only protection afforded the company's servants and the public against its torts were the contents of the pockets of its directors and agents, if they should be liable. Those people who joined the cooperative intended it to be operated, and they or their representatives must, logically enough, pay the cost of its operation from the funds provided for that purpose.

We have in fact a two-fold problem: (1) whether the creation of such an organization does not involve the creation of a corporate person exactly as the creation of any business enterprise; and (2) whether

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[74] 3 MAITLAND, COLLECTED PAPERS 321 *ff.*

there is any ground for the exclusion of this type from the ordinary rules of vicarious liability. The cooperative is just as much a person to those who work for it or have dealings with it as a private individual or a railroad company. We must judge it by what in actual fact it is, and not by the theories it proclaims. Differentiation should not be made on the ground of character or doctrine, but of factual reasoning.

The only reason (boiled down to its essentials) why such a company might not be liable for fault is its "public" character. But in this particular problem that is no adequate reason at all. Aside from serving a corporate function and not serving the whole public, it is the merest justice that, if a group of men seek to benefit themselves, due care should be taken not to harm those interests met in the process. A cooperative's personality will suffer no less detriment if it is allowed to be irresponsible than a private enterprise. Long experience has shown that the enforcement of liability is the only adequate means to assure care in the operation of any large corporation, and it is difficult to see why this conclusion is not applicable in the principal case.

The whole problem is an illustration of the vital need of insisting as much on the processes of institutions as on their purposes. A negligently administered cooperative power company may aim at inducting everyone into the realm of light and labor-saving devices, but it is socially essential to make it adequately careful of the methods employed. It is only by recognition of the personality of this type of corporation and of the consequences of this personality that this end may be satisfactorily achieved.

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# NOTES AND COMMENTS

## The Agency Problems of Insurance Liability in Mississippi—The Effect of Section 5196, Mississippi Code of 1930, Upon Waiver and Estoppel

### I. *Introduction*

Problems arising from the principal-agent relationship have a peculiar significance in the law of insurance. The reason is two-fold: first, the bulk of the insurance business is carried on by corporations or associations of a similar nature, and these associations, being only legal persons, can act only through agents; secondly, the enormous scope of the insurance business necessitates the employment of agents of varying powers, most of whom are but remotely connected with the central office of the company.

> "The home office is usually distant and consequently the local agent takes on in the mind of the insured a representative character not possessed by agents in other fields. The ordinary individual makes his contract without professional advice, trusting instead to the assurances of the agent of the opposite party. Applicable more perhaps to questions of waiver and estoppel divorced from the agency complication, but not without relation to the agency questions, is the peculiar characteristic that disputes between the parties do not usually arise until after a loss has happened and it is too late to restore the parties to their original position so that to deny recovery is to disappoint expectations at a time when the opportunity for making new and more satisfactory arrangements is forever gone. Another contributing factor is the frequent severity of obscure and narrow conditions, many of which come for the first time to the actual notice of the insured after a loss."[1]

The statement is frequently made by courts and writers that insurance agents are governed by the general principles of the law of agency.[2] Therefore, a brief review of some of the more salient principles of agency in the field of insurance is necessary as an introduction to this discussion. One text writer outlines the topic in this manner:

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[1]Langmaid, *Waiver and Estoppel in Insurance Law—The Agency Problems* (1933) 21 Calif. L. Rev. 91.

The following excerpt from the testimony in Aetna Ins. Co. v. Singleton, 174 Miss. 556, 563, 164 So. 13, 14 (1935), in which the insured was being questioned about his dealings with the insurer's local agent, is indicative of the attitude taken by the average man toward insurance agents and the reliance placed on them: "Ans. 'He is all the man I ever knew in the transaction. I never knew anybody else, and I thought he knew what he was doing.'"

[2]Rivara v. Queen's Ins. Co., 62 Miss. 720 (1885); Germania Life Ins. Co. v. Bouldin, 100 Miss. 660, 56 So. 609 (1911); New York Life Ins. Co. v. O'Dom, 100 Miss. 219, 56 So. 379 (1911); Riverside Development Co. v. Hartford Fire Ins. Co., 105 Miss. 184, 62 So. 169 (1913); American Bankers' Ins. Co. v. Lee, 161 Miss. 85, 134 So. 836 (1931); Maryland Casualty Co. v. Campbell, 255 Fed. 437 (C. C. A. 5th, 1919); Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131 (1897); 1 Joyce, Insurance (2d ed., 1917) 1029; Vance, Insurance (2d ed., 1930) 407.

"(a) There is no presumption that one person has authority to bind another by word or act. Such authority must be proved to have been actually or apparently given.

"(b) The insurer is estopped to deny that his agent possesses that authority with which he has apparently clothed him.

"(c) Limitations upon the powers apparently possessed by an insurance agent cannot affect the insured unless communicated.

"(d) Certain burdensome incidents accompany the conduct of business through an agent, which having their basis in a sound public policy, cannot be escaped. Among these are:

(1) Any fraud or wrong perpetrated by the agent in the course of his employment binds the principal, though not authorized.

(2) Any knowledge possessed by the agent, material to the transaction in which he is employed, will bind the principal, irrespective of its actual communication by the agent.

"(e) The person for whom the agent acts is to be determined by the facts of each case, and not by the mere words of the parties, but an agent cannot act for both parties without the consent of both."[3]

However, the judicial application of these principles varies with the class of insurance agent involved. Insurance agents are roughly divisible into three categories: (1) the home office officials; (2) general agents of the insurer; (3) special agents of the insurer.

The titles borne by the home office officials vary,[4] but, as to the insurer-insured relationship, they constitute the absolute *alter ego* of the company. In the conduct of the business they usually possess all the powers of the corporation.[5] Although their powers may be limited by the by-laws of the company, constructive notice thereof is binding only upon members of the corporation and outsiders are entitled to rely upon the apparent authority of the given official.[6] Because of the fact that corporations can act only through agents, the courts have held that insurance companies cannot provide in their policies or applications that *no* agent of the company may waive the provisions thereof; they must at least except the home-office officials.[7] Because of the broad powers of

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[3] VANCE, INSURANCE (2d ed., 1930) 407.

[4] *E. g.*, "president," "vice-president," "secretary," "assistant secretary," "treasurer," "superintendent," "general manager." VANCE, INSURANCE (2d ed., 1930) 423.

[5] 2 COUCH, INSURANCE (1929) 1396; 1 JOYCE, INSURANCE (2d ed. 1917) 1046; VANCE, INSURANCE (2d ed. 1930) 423.

[6] Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co., 60 U. S. 318, 15 L. ed. 636 (1856); Rathburn v. Snow, 123 N. Y. 343, 25 N E. 379, 10 L. R. A. 355 (1890); 1 JOYCE, INSURANCE (2d ed. 1917) 1046.

[7] "A contracting party cannot so tie his own hands, so restrict his own legal capacity for future action, that he has not the power, even with the assent of the

such officials, it is obvious that only rarely would a case arise in which the insurer would dispute the authority of the home-office officials to bind the company. No such case has been found in Mississippi.

The difficult distinction arises between general and special agents of the insurer. Briefly, it may be said that a general agent is a person who is authorized to transact all his principal's business of a particular kind or in a particular place. In insurance, the term is largely geographic, and such agents are often called "district" or "division" agents of the company. However, the term is not always used in a geographic sense; and even though an agent has no especial district under his supervision, he is properly denominated a general agent, if he has full powers of contracting for insurance on behalf of his principal.[8]

Once it has been established, or is admitted, that a given person is the general agent of the insurer, the acts done and the knowledge acquired by the agent in his dealings with the insured are binding upon the insurer.[9]

A special agent is a person to whom has been delegated the authority to do some special act or acts, or who has been charged with the performance of some special duty. The members of this category most frequently considered by the courts in insurance cases are soliciting and collecting agents, often referred to as "local" agents. Coming within the same classification are medical examiners, adjusters, appraisers, attorneys, and sub-agents working under the direction of general agents.[10]

Of course, the actual authority of a special agent is limited to the performance of the specific duty for which he is employed, and he has little, if any, actual authority to bind the insurer by the knowledge acquired or the acts done in his transactions with the insured. However, the facts of individual cases often show that the agent was actually possessed of the power exercised, or that the insured had reasonable ground

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other party, to bind or obligate himself by his further action or agreement contrary to the terms of the written contract." Lamberton v. Connecticut Fire Ins. Co., 39 Minn. 129, 39 N. W. 76, 77, 1 L. R. A. 222 (1888). VANCE, INSURANCE (2d ed. 1930) 423, n. 62.

*Accord:* Home Ins. Co. v. Gibson, 72 Miss. 58, 17 So. 13 (1894); London Guarantee & Accident Co. v. Mississippi Central R. R., 97 Miss. 165, 52 So. 787 (1910); Fraternal Aid Union v. Whitehead, 125 Miss. 153, 87 So. 453 (1921).

But an insurer can effectively confine the power to waive provisions of the policy to *specified* officers. New York Life Ins. Co. v. O'Dom, 100 Miss. 219, 56 So. 379 (1911); Travellers' Fire Ins. Co. v. Price, 169 Miss. 531, 152 So. 889 (1934).

[8]VANCE, INSURANCE (2d ed. 1930) 416, citing TIFFANY, AGENCY (2d ed. 1924) 49 *et seq.*

[9]Liverpool & London & Globe Ins. Co. v. Sheffy, 71 Miss. 919, 16 So. 307 (1894); Mitchell v. Mississippi Home Ins. Co., 72 Miss. 53, 18 So. 86 (1894); Ins. Co. of New York v. Gibson, 72 Miss. 58, 17 So. 13 (1894); Liverpool & London & Globe Ins. Co. v. Farnsworth Lumber Co., 72 Miss. 555, 17 So. 445 (1895); London Guarantee & Accident Co. v. Mississippi Cent. R. R., 97 Miss. 165, 52 So. 787 (1910); Scottish Union & National Ins. Co. v. Wylie, 110 Miss. 681, 70 So. 835 (1916); Liverpool & London & Globe Ins. Co. v. Hinton, 116 Miss. 754, 77 So. 652 (1918); Hartford Fire Ins. Co. v. Buckwalter Lumber Co., 116 Miss. 822, 77 So. 798 (1918); Fidelity-Phenix Ins. Co. v. Redmond, 144 Miss. 749, 111 So. 366 (1927).

[10]VANCE, INSURANCE (2d ed. 1930) 418.

for believing that he was possessed of such power. The question then arises as to binding effect of his acts and knowledge upon the insurer. The result is that a large number of insurance cases resolve themselves into an attempt by the insured to attribute the powers of a general agent to a special agent with regard to a specific transaction, and a counter-attempt by the insurer to classify such an agent as a special agent with the limited powers nominally given him.

These cases will be the primary concern of this note, with particular reference to the effect of Section 5196 of the Mississippi Code of 1930, which is quoted in the note below.[11] As will be pointed out later, for several years the Mississippi Court construed this statute in such a manner as to broaden beyond the contemplation of the common law the concept of apparent authority. The doing of any of the acts mentioned in the statute was sufficient to constitute a person the general agent of the insurer within the scope of the things he was employed to do. However, in 1940 the court overruled its former holdings on the statute and held that the statute was not to be construed to broaden the power of a special agent to bind his principal.[12] Chief Justice Smith used this language in deciding the case:

> "The words 'as to all the duties and liabilities imposed by law' *ex vi termini* refer not to duties and liabilities that grow out of the contract of insurance, such duties and liabilities being determined by the provisions of the contract itself, but to duties and liabilities imposed on insurance agents and their agents by law outside and independent of the provisions of the contract of insurance."[13]

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[11]"*Agent defined—fraudulent representation—penalty.* Every person who solicits insurance on behalf of any insurance company, or who takes or transmits, other than for himself, an application for insurance, or a policy of insurance, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall examine or inspect any risk, or receive, collect or transmit any premium of insurance, or make or forward a diagram of any building, or do or perform any other act or thing in the making or consummation of any contract of insurance, for or with any such insurance company, other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance, or request, or by the employment of the insurance company, or of, or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract; such person knowingly procuring by fraudulent representations, payment, or the obligation for the payment, of a premium of insurance, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned for not more than one year." Miss. Code Ann. (1930) § 5196.

[12]Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 198 So. 625 (1940). The mention made of this case here is not to be taken as an exhaustive discussion. The case will be mentioned from time to time throughout the note and will be thoroughly analyzed as to its relationship with other decisions of the Mississippi Court. See *infra*, p. 232. The only purpose in inserting it at this point is to present the present attitude of the court on this problem as opposed to its former holdings as an introduction to a deeper study of the question. The decision of this case and speculation as to its binding effect upon courts in the future provided the stimulus for the writing of this note.

[13]Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 700, 198 So. 625, 627 (1940).

Bearing in mind the wording of this statute and the varying constructions of the Mississippi Court, we are faced with this problem: When is the holder of an insurance policy safe in acting, or refraining from acting, upon the faith of the words or acts of a purported representative of an insurance company?

## II. *Decisions of the Mississippi Court*

Section 5196 made its first appearance in the Code of 1880.[14] The terms of the statute at that time differed from its present wording and its application to civil cases was doubtful.[15] When the statute was reenacted in the Code of 1906, it was changed to its present form by the inclusion of the words "as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract."[16] But, even in its changed form, it escaped the notice of the bench and bar until 1917, when it was first applied to the insured-insurer relationship.[17] From that time until 1940 it was invoked in every case involving the question of an insurance agent's authority. In 1940, the Court radically changed its viewpoint on the statute, as pointed out above.[18] The decisions of the court are therefore readily divisible into three periods: (1) 1817-1917, when the common law was in full effect; (2) 1917-1940, when the court was applying what we may call the "pre-Saucier" construction of section 5196; (3) 1940 to the present, when the court is applying its "post-Saucier" construction on section 5196.

### A. The Common Law Period (1817-1917)

The case of *Planters' Insurance Co. v. Myers*[19] involved the question of whether the agency was for the insurer or for the insured, and the court held that the insurer could not, by a written stipulation in the application,[20] preclude the insured from proving that the agent who solicited the insurance, collected the premium, and filled out the application for insurance was the agent of the insurer.[21] The court points out

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[14]Miss. Rev. Code (1880) § 1085.

[15]See argument of the court in Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 198 So. 625 (1940); and in Home Ins. Co. v. Thornhill, 165 Miss. 787, 144 So. 861 (1932).

[16]Miss. Code Ann. (1930) § 5196.

[17]Big Creek Drug Co. v. Stuyvesant Ins. Co., 115 Miss. 561, 76 So. 548, overruling suggestion of error in 115 Miss. 333, 75 So. 768 (1917).

[18]Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 198 So. 625 (1940), discussed *supra,* p. 223, and *infra,* p. 232.

[19]55 Miss. 479, 30 Am. Rep. 521 (1877).

[20]The policy provision was: "It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken out by the company, shall be deemed to be the agent of the assured, . . . and not of this company, under any circumstances whatever, in any transaction relating to this insurance."

[21]*Accord:* Lumbermen's Mutual Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140 (1896); Aetna Life Ins. Co. v McCullagh, 185 Ky. 664, 215 S. W. 821 (1919); Endowment Rank, Knights of Pythias v. Cogbill, 99 Tenn. 28, 41 S. W. 340 (1897). *See* Sternaman v. Metropolitan Life Ins. Co., 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625 (1902), where such a provision was held void as against public policy.

*Contra:* (Such a provision is binding on the insured) Hubbard v. Mutual Reserve Fund Life Association, 80 Fed. 681 (C. C. R. I. 1900).

that this is not a decision that the company may not restrict the authority of its agents when notice of such restriction is given to the insured in the application. In a later case it was held that the *Myers* case is not to be construed to prevent the parties from agreeing that, for certain purposes, the agent is to be deemed the agent of both parties.[22]

*Home Insurance Co. v. Sorsby*[23] seems to be the first case where the insured attempted to attribute the powers of a general agent to a soliciting agent. As a defense to the suit on a fire insurance policy the company set a breach of the "other insurance" clause. The insured alleged as a basis for a waiver of the clause that he had told the company's soliciting agent of his intention to procure the additional insurance, and that the agent had acquiesced. The court held that there could be no recovery on the policy; that the agent could not bind the company by his acts or knowledge, since he was only a soliciting agent. The decision is based entirely upon the actual authority of the agent.[24]

In *Rivara v. Queen's Insurance Co.*,[25] the insurer set up breaches of certain policy provisions and the plaintiff offered evidence tending to prove a waiver of the provisions by an authorized agent. By its instructions the lower court withheld consideration of this testimony from the jury. The court discussed at length what proof is necessary by the plaintiff to prove that a given agent was the *alter ego* of the company,[26] and held that the jury should have been permitted to determine whether the agent who issued the policy had authority to pass on risks and issue policies without forwarding applications to his company so as to constitute him the *alter ego* of the company in his dealings with the insured. It is to be noted that this is not a decision on the doctrine of apparent authority, but is a case defining actual authority in the field of insurance.[27]

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[22]Alabama Life Ins. Co. v. Herron, 56 Miss. 643 (1879). This was a suit on a premium note and the question as to whether the company's agent could also be the insured's agent for the purpose of receiving delivery of the policy was before the court.

[23]60 Miss. 302 (1882).

[24]Followed in Liverpool & London & Globe Ins. Co. v. Van Os & Shuster, 63 Miss. 431 (1886).

[25]62 Miss. 720 (1885).

[26]The case is often cited on this point for the following language: "The powers of insurance agents to bind their companies are varied by the character of the functions they are employed to perform. Their powers in this respect may be limited by the companies, but parties dealing with them as to matters within the real or apparent scope of their agency are not affected by such limitations unless they had notice of the same. An insurance agent clothed with authority to make contracts of insurance or to issue policies stands in the stead of the company to the assured. His acts and declarations in reference to such business are the acts and declarations of the company. The company is bound, not only by notice to such agent, but by anything said or done by him in relation to the contract or risk, either before or after the contract is made." *Id.* at 728.

[27]Followed in, Indemnity Co. of America v. Jenkins, 107 So. 208 (Miss. 1926); Liverpool & London & Globe Ins. Co. v. Hinton, 116 Miss. 754, 77 So. 652 (1917); New York Life Ins. Co. v. O'Dom, 100 Miss. 219, 56 So. 379 (1911). *See* Liverpool & London & Globe Ins. Co. v. Delaney, 190 Miss. 404, 200 So. 440 (1941) for a recent affirmance of this definition and a statement that the status of such an agent is not affected by Saucier v. Life & Casualty Co. of Tennessee, 189 Miss. 693, 198 So. 625 (1940).

In *Sutherland v. Federal Ins. Co.*,[28] the Mississippi court made its first bow to the doctrine of apparent authority by holding that the insurer was estopped to deny that it had terminated the authority of a local agent, when such an agent continued to represent himself to the insured as agent of the insurer, and no notice of the change of agency was given to the insured. A similar case is that of *Caledonian Fire Ins. Co. v. Shepherd*.[29] In that case the old agent had resigned. One Cook assumed his duties, having been approved as temporary agent by the company. While he was acting as temporary agent, he told the insured that he would grant her permission to procure additional insurance on the insured property, but he did not indorse permission on the policy until after he had been notified of his rejection as local agent by the company. Cook never did comply with the statute requiring him to procure a certificate of authority.[30] The court held that the agent's permission was binding on the company.

A case more obviously within the principle of apparent authority is that of *Germania Life Ins. Co. v. Bouldin*.[31] This was a suit in equity for reformation of a life policy and recovery thereon. One Thompson was the defendant's only agent in Mississippi. He was given broad powers by the company in the management of the business. His job was to solicit business, advertise and promote the company, and appoint local agents in Mississippi, Tennessee and Arkansas. However, all applications for insurance had to pass the approval of the company before the insurance took effect. The plaintiff's application was approved and a policy was issued to Thompson for delivery. The policy was different from that for which the plaintiff had bargained with Thompson. Without disclosing this fact to the plaintiff, Thompson attached a rider to the policy which made the policy acceptable to the plaintiff. Plaintiff never read anything but the rider. The court held that the plaintiff could recover according to the terms of the rider.

> "Cases frequently arise where the principal is estopped from denying the authority of his agent, and this is especially true where the agent, with the knowledge and consent of the principal, holds himself out to the world as having certain powers. . . . The principal need not authorize the agent to practice a fraud on third parties, yet if he authorize his agent to transact the business with a third party, and in so doing the agent practices the fraud on the party, the principal is liable."[32]

A fact having great weight with the court was the fact that the company knew that the agent was using the company's letter-head on which the agent described himself as the district agent of the company.

In *New York Life Ins. Co. v. O'Dom*,[33] the court held that the agent of the insured was not justified in relying upon the company cashier's

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[28]97 Miss. 345, 52 So. 689 (1910).
[29]111 Miss. 175, 71 So. 314 (1916).
[30]Miss. Code Ann. (1906) § 2627.
[31]100 Miss. 660, 56 So. 609 (1911).
[32]Germania Life Ins. Co. v. Bouldin, 100 Miss. 660, 678, 56 So. 609, 613 (1911).
[33]100 Miss. 219, 56 So. 379 (1911).

extension of the time for payment of a premium in the face of a provision in the policy that only certain high officials of the company had authority to waive forfeitures. The court said that the burden is upon the plaintiff to prove either actual or aparent authority on the part of the agent. As to apparent authority, the burden extends to the proof of misleading acts, not on the part of the agent, but on the part of the company. The court was profoundly influenced by the non-waiver clause in the policy and held that such a clause was sufficient notice to the insured to prevent his being misled by any acts of the agent.[34]

B. The Period of the "Pre-Saucier" Construction of Section 5196 (1917-1940)

Although section 5196 appeared in its present form in the Code of 1906,[35] it apparently escaped the notice of the lawyers and judges of the state until 1917, when it was mentioned for the first time in the case of *Big Creek Drug Co. v. Stuyvesant Ins. Co.*[36] The insured was suing on a fire insurance policy which included the usual "iron safe" clause. The defendant set up a breach of this condition as a defense. The plaintiff offered evidence to prove that one Dezonia, the company's soliciting agent and the only person with whom the plaintiff dealt in the transaction, knew that he had no safe. The lower court excluded the evidence and directed a verdict for the defendant. In reversing the case, the Supreme Court said:

> "It makes no difference whether Dezonia was a soliciting agent or a general agent of his company. The testimony undisputably shows that he was the only agent who solicited the insurance, inspected the risk, accepted the application, receipted for the premium, and delivered the policy. . . . In this case the knowledge of Dezonia was the knowledge of the company. . . . This is not a case where a solicitor or local agent undertakes to waive a condition of the policy *after* the contract is executed."[37]

In overruling a suggestion of error,[38] the court clarifies the distinction made between acts done by a soliciting agent before the policy is delivered and those done after delivery. It is here that we find the first mention of the statute.

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[34]This is a leading case on the binding effect of limitations upon the authority of insurance agents. See also Travellers' Fire Ins. Co. v. Price, 169 Miss. 531, 152 So. 889 (1934); Interstate Life & Accident Ins. Co. v. Pannell, 169 Miss. 50, 152 So. 635 (1933).

*Cf.* Fraternal Aid Union v. Whitehead, 125 Miss. 153, 87 So. 453 (1921); London Guarantee & Accident Ins. Co. v. Mississippi Central R. R., 97 Miss. 165, 52 So. 787 (1910); Home Ins. Co. v. Gibson, 72 Miss. 58, 17 So. 13 (1894), *supra,* note 7. The court in the *O'Dom* case carefully distinguished the *Mississippi Central* case, *supra,* on the ground that, in the *O'Dom* case, the policy excepted certain officials who could waive the policy provisions.

[35]Miss. Code Ann. (1906) § 2615.

[36]Big Creek Drug Co. v. Stuyvesant Ins. Co., 115 Miss. 561, 76 So. 548, overruling suggestion of error in 115 Miss. 333, 75 So. 768 (1917).

[37]115 Miss. at 337, 75 So. at 769. (Italics added.)

> "The position of this court is, not that a soliciting agent may waive important provisions of the policy after the policy is executed and delivered and becomes a binding contract, but that the principal is bound by the knowledge possessed by the agent who inspects the risk and accepts the application for the insurance. We are dealing here with the status or condition of property when it is first inspected as a risk, existing conditions, and not with something to be done or left undone in the future. Any other construction, in our opinion, would violate section 2615, Code of 1906, defining an 'agent' of an insurance company.
>
> "We are not called upon to declare all the purposes of this statute. One of its purposes certainly was to prevent fraudulent agencies. But it speaks the policy of our state, to bind the company for any act done by an agent within the scope of his duties."[39]

This purpose of the statute was reannounced in *Stewart v. Coleman & Co.*,[40] where Judge Ethridge said that it "makes the agent delivering an insurance policy the agent of the company for that purpose." The court followed this view of the statute consistently from 1917 to 1940. That is to say, if the agent, whatever his actual authority might be, was engaged in the performance of any of the acts enumerated in the statute, any knowledge acquired by him or any act done by him in his transactions with the insured was binding on the company.

However, it is to be noted that the court was strict in requiring that the acts done by the agent should fall within the terms of the statute. In *Travellers' Fire Ins. Co. v. Price*,[41] fire and theft insurance was effected on an automobile through an admitted general agent of the company. Later, when approached by a soliciting and collecting sub-agent of the general agent, the insured's husband informed him of certain breaches of the conditions of the policy and asked him if they avoided the policy. The sub-agent assured him that they did not and collected part of the premium due. In defending a suit on the policy, the company set up the breaches of condition and the plaintiff maintained that there had been a waiver of them. The Supreme Court held that the plaintiff could not recover on the policy; that the sub-agent's statements were not binding on the company. In discussing the statute, Judge Anderson said:

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[38]Big Creek Drug Co. v. Stuyvesant Ins. Co., 115 Miss. 561, 76 So. 548 (1917).

[39]*Id.* at 562, 76 So. at 548. *Query:* Is the main decision to be taken as a holding at common law that a mere soliciting agent can bind his principal by his words and acts before the consummation of the policy? Or was the court relying upon the statute in reaching its conclusion in the main opinion, although no mention is made of the statute therein?

The distinction between the power of special agents to waive conditions precedent and to waive conditions subsequent under section 5196 was discussed more fully and more clearly in Travellers' Fire Ins. Co. v. Price, 169 Miss. 531, 152 So. 889 (1934). *See infra*, p. 228.

[40]120 Miss. 28, 81 So. 653 (1919).

[41]169 Miss. 531, 152 So. 889 (1934).

> " . . . It applies alone to what takes place before and up to and including the consummation of the insurance, and after its consummation what takes place in the examination and adjustment of the loss. The phrase 'or do or perform any other act or thing in the making or consummation of any contract of insurance' limits and qualifies what goes before it, and the language further on down, 'or who shall examine into or adjust or aid in adjusting any loss for or on behalf of any such insurance company,' has reference alone, of course, to the adjustment of the loss. As to all other matters and things, the principles of the common law govern."[42]

We see then that the statute is applicable to knowledge acquired or acts done by an agent either before the policy is put into effect, or after a loss has occurred and an adjustment thereof is being made.

Accordingly, it was held in *Lamar Life Ins. Co. v. Kemp*[43] that the insurer was bound by the soliciting agent's delivery of a life policy without collection of the first premium in spite of a provision in the application and policy that the insurance should not take effect until payment of the first premium was made. The insured kept the policy for five months before he died without making any premium payment whatsoever.[44] In deciding the case, the court used this language:

> "Under section 2615, Code 1906 the act of appellant's soliciting agent in delivering the policy without collecting the first premium, was the act of appellant, notwithstanding any provision in the application for the insurance and the policy to the contrary. That statute . . . simply put Jones, the soliciting agent, in the shoes of appellant itself. In other words, when Jones delivered the policy without the payment of the premium, it was a delivery by appellant, with the imputed knowledge that the first premium had not been paid."[45]

Likewise, the insurer is bound by a special agent's delivery of a policy with knowledge of any other facts which make it impossible for

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[42]Travellers' Fire Ins. Co. v. Price, 169 Miss. 531, 539, 152 So. 889, 891 (1934). Followed in Aetna Ins. Co. v. Singleton, 174 Miss. 556, 164 So. 13 (1935), as to waiver of a forfeiture for failure to pay a premium.

Judge Ethridge dissented violently in the *Price* case on the theory that the word "consummation" in the statute extends to the time the purpose of the contract of insurance effected, rather than to the time that the contract is put into force. He applied this construction of the statute in the case of Reliance Life Ins. Co. v. Cassity, 173 Miss. 840, 163 So. 508 (1935), a case involving representations of the company's cashier to the insured as to the degree of disability necessary to entitle the insured to total disability benefits. The court held, without mention of the *Price* case and without any reason for its varying construction of the statute, that the cashier's statements were binding on the insurer.

[43]154 Miss. 890, 124 So. 62 (1929).

[44]Note the identity of the facts in this case with those in Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 198 So. 625 (1940), where the opposite result was reached.

[45]Lamar Life Ins. Co. v. Kemp, 154 Miss. 890, 896, 124 So. 62, 63 (1929). For a decision to the same effect, see Mutual Life Ins. Co. of New York v. Vaughan, 125 Miss. 369, 88 So. 11 (1921), where a soliciting agent mailed the policy to the insured and, through a mistake, omitted a letter telling him to pay the first premium.

the insured to comply with the provisions of the policy. For example, in the case of *Home Ins. Co. v. Thornhill*[46] a soliciting agent filled in an application for fire insurance and gave an incorrect answer as to the condition of the insured's title, although the insured had told him the true state of facts. The application provided that no statement or act of any agent not contained in the policy should be binding on the company. When the company defended on the ground that the plaintiff did not have sole and unconditional ownership of the property as represented in the application, the court held that the company had waived this provision of the application; that the delivery of the policy by the agent with knowledge of the non-compliance was the act and knowledge of the company.[47] Chief Justice Smith said:

> "Any doubt that could arise as to the rule to be here applied is removed by section 5196, Code 1930, under which Moseley is expressly made the agent of the appellant in soliciting and delivering the policy 'as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract.' This provision writes out of the application and the policy the limitations on the common law liability of the appellant growing out of Moseley's acts in obtaining the application for the policy."[48]

Following the same reasoning, the court has held that mistakes of soliciting agents affecting the insured's ability to comply with policy provisions are imputed to the company, where the policy is subsequently delivered by the same agent.[49] Intimating that the company would be bound by common law principles of agency regardless of section 5196, the court has held that a medical examiner's knowledge of the unfit physical condition of the insured is imputable to the insurer under the statute.[50]

The court has not been consistent in its decisions on the binding effect of express agreements of special agents with policy-holders before

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[46]165 Miss. 787, 144 So. 861 (1932).

[47]*Accord* as to "sole and unconditional ownership" clauses under identical factual situations: Hartford Fire Ins. Co. v. Williams, 165 Miss. 233, 145 So. 94 (1932); Hartford Fire Ins. Co. v. Clark, 154 Miss. 418, 122 So. 551 (1929).

*Accord* as to delivery by subagent with knowledge that insured could not comply with "vacancy" clause: Aetna Ins. Co. v. Lester, 170 Miss. 353, 154 So. 706 (1934).

[48]Home Ins. Co. v. Thornhill, 165 Miss. 787, 795, 144 So. 861, 862 (1932). The court pointed out that the words "as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract" did not appear in the Code of 1880 and argued that the inclusion of these words in the Code of 1906 was indicative of a legislative intent that the statute should apply in suits between the insured and the insurer. *But see* Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 198 So. 625 (1940), where Judge Smith reached the opposite result without mention of his reasoning in the *Thornhill* case.

[49]St. Paul Fire & Marine Ins. Co. v. Loving, 163 Miss. 114, 140 So. 737 (1932); Mutual Life Ins. Co. of New York v. Vaughan, 125 Miss. 369, 88 So. 11 (1921).

In the *Loving* case, a soliciting agent filled in an application for automobile fire and theft insurance, after having made an independent investigation of the risk, and mistakenly stated the age of the car. In the *Vaughan* case, the soliciting agent inadvertently omitted to include a letter telling the insured to take a medical examination in the envelope containing the policy.

[50]New York Life Ins. Co. v. Smith, 129 Miss. 544, 91 So. 456 (1922).

delivery of the policy. In *Interstate Life & Accident Ins. Co. v. Ruble*,[51] the court held that the insurance company could not enforce a forfeiture for failure to pay premiums where the state agent, who did not have authority to make contracts of insurance, had agreed with the plaintiff before delivery of the policy that a certain soliciting agent's indebtedness to plaintiff should be applied to the payment of the premiums on the plaintiff's son's insurance. The court said that the effect of the statute was to make an agent "the alter ego of the company within the scope of his authority," and that since the state agent had authority to deliver policies and collect premiums, he could bind the company by this premium arrangement.

However, within the same year, in *American Bankers' Ins. Co. v. Lee*,[52] that the statute was ineffective to bind an insurance company to its soliciting agent's agreement with the insured that his accident policy should take effect from the date of the payment of the first premium, rather than from the date of delivery as provided in the application. The application was never read by the insured. The agent filled it in and had the insured sign it, telling him that it was a mere matter of form. In reversing a decree of the lower court for reformation of the policy to take effect on the date of the payment of the first premium, the court held that the insured had not sustained his burden of proof as to the apparent authority of the soliciting agent. The court leaned heavily upon the *O'Dom* case[53] and dismissed the insured's arguments as to section 5196 with the statement that the *O'Dom* case recognized the distinction between general and special agents and that the *O'Dom* case was "decided in the light of the substance of this statute." It is quite true that the statute was on the books at the time of the decision of the *O'Dom* case, but no mention of it appears in the case, either in the judge's opinion or the attorney's briefs. The case is good authority at common law, but it has no application to the facts of the *Lee* case in the face of the statute. It is submitted that the *Lee* case is completely out of harmony with the contemporaneous trend of authority.

The only case prior to 1940 applying the adjustment provisions of the statute[54] involved an employer's indemnity policy which provided that the insured should not voluntarily assume any liability nor incur an expense with the exception of immediate surgical or medical relief, and that no provision of the policy could be waived except by certain high officials of the company. The insured paid an injured employee's salary during the time of his recovery and sued to recover that amount from the insurer on the ground that certain adjusters had agreed to the payment. The court held that the agreement of the adjusters was binding on the company and that the policy provisions against waivers by subordinate agents were ineffective.

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[51]160 Miss. 206, 133 So. 223 (1931).
[52]161 Miss. 85, 134 So. 836 (1931).
[53]New York Life Ins. Co. v. O'Dom, 100 Miss. 219, 56 So. 379 (1911).
[54]Capital Paint & Glass Co. v. St. Paul Mercury Indemnity Co., 180 Miss. 341, 176 So. 729 (1937). See note 11 for the full wording of Section 5196.

> "The trouble about that contention is that under section 5196, Code of 1930, they [the policy provisions] do not control—they are excluded from the policy by the law. . . . The adjusters under the statute had the same authority that appellee itself had."[55]

Thus the court construed the adjustment provisions of the statute in the same manner that it had construed the balance of the section.[56]

### C. The *Saucier* Case

The case of *Saucier v. Life & Casualty Ins. Co. of Tennessee*[57] was an action on a life insurance policy. One Latimer, a soliciting agent for the insurer, persuaded the insured to take out the policy. The insured was unable to pay the first premium and Latimer allowed him credit for that amount. He told the wife of insured, plaintiff in this suit, that the insurance went into effect immediately. The insured died a few days later without having paid the first premium. The application provided that the insurance should not take effect until the first premium had been paid in cash during the lifetime and good health of the insured, and that only certain high officials of the company had power "to make or modify this contract." The case was appealed to the Supreme Court in 1938 and reversed and remanded on a point irrelevant to this discussion.[58] On retrial the lower court directed a verdict for the insurance company. The sole point on the second appeal was Latimer's authority to bind the insurer by his delivery of the policy without requiring payment of the first premium.

The court held that if Latimer had authority to bind the company, such authority must be conferred by section 5196. Chief Justice Smith, speaking for the majority of the court, held that the statute was ineffective to extend the power of a soliciting agent beyond that given by the company and limited by the policy. He said:

> "The words 'as to all the duties and liabilities imposed by law' *ex vi termini* refer not to duties and liabilities that grow out of the contract of insurance, such duties and liabilities being determined by the provisions of the contract of insurance."[59]

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[55] *Id.* at 348, 176 So. at 731.

[56] In Reliance Life Ins. Co. v. Cassity, 173 Miss. 840, 163 So. 508 (1935), the court held that a company cashier's statements to the insured as to the degree of disability necessary to entitle him to total disability benefits were binding on the insurer. The case was decided on the fact that the cashier had authority to transmit applications for benefits under policies and construed this to be an "act or thing in the making or consummation of any contract of insurance," within the contemplation of Section 5196. The conflict of this case with the general trend of authority is pointed out in note 42 *supra*. *Query*: Could the result of this case have been reached in a more logical manner under the adjustment provisions of the statute?

[57] 189 Miss. 693, 198 So. 625 (1940).

[58] Saucier v. Life & Casualty Ins. Co. of Tennessee, 181 Miss. 887, 179 So. 851 (1938). On the first trial the declaration alleged that Latimer was general agent of the defendant. The case came upon demurrer and the court held that a general agent could bind the insurer by an unconditional delivery of the policy without payment of the first premium. On retrial, the declaration was amended by striking the words "general insurance agent" and substituting the words "local agent for said company."

[59] Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 700, 198 So. 625, 627 (1940). See note 11 *supra* for the full wording of the statute.

The court pointed out that all the surrounding sections of the code[60] deal with the regulation of insurance agents and held that the purpose of the statute is "to enable the state to effectually supervise insurance companies and their agents." According to the court, the statute accomplishes that purpose in this manner:

> " . . . (1) by making all persons doing the acts set forth therein in making, or adjusting a loss under, an insurance policy 'the agent(s) of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law,' and (2) by rendering ineffective any condition or stipulation in the policy to the contrary. No reference is made in the statute to any conditions, stipulations, or agreements in the policy, except such as negative the agency for the insurance company of the persons referred to in the statute, and no other conditions, stipulations, or agreements in the policy are affected thereby."[61]

That is to say, the court considers that the effect of the statute is not to raise any person who does any of the acts enumerated in the statute to the level of a general agent of the company for which the acts are done; but that the effect of the statute is simply to make such a person *an* agent of the company, still preserving the common law distinction between general and special agents with the authority of a given agent to be determined by the powers actually or apparently conferred upon him by the company. Therefore, under the *Saucier* case, the only effect of the statute is to establish a connection between the company and any person doing the named acts for the purpose of implementing the statutory provisions governing insurance agents and companies. When a person does any of the acts named in the statute, he is to be deemed an agent of the company for which the acts are done "as to all the duties and liabilities imposed by law," which include personal liability on the part of an agent if he makes a contract for the insured with a company not licensed to do business in this state;[62] penalty against an agent for not obtaining a license and exhibiting it;[63] penalty against an agent for signing a blank policy;[64] penalty against an adjuster for acting without a license;[65] penalty against an agent for soliciting without a license;[66] penalty against a life insurance agent for acting as such without a license.[67]

Judge Smith supported this conclusion by a review of the history of the statute—the fact that it grew from a statute regulating agents of unlicensed foreign companies to its present dimensions—, and apparently

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[60] MISS. CODE ANN. (1930) §§ 5195-5209.

[61] Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 702, 198 So. 625, 628 (1940).

[62] MISS. CODE ANN. (1930) § 5197. *See* Wilkinson v. Goza, 165 Miss. 38, 145 So. 91 (1932), a case utilizing § 5196 for this purpose.

[63] MISS. CODE ANN. (1930) § 5198.

[64] *Id.* at § 5200.

[65] *Id.* at § 5203.

[66] *Id.* at § 5204.

[67] *Id.* at § 5209.

overlooked his own opinion in the *Thornhill* case,[68] that the addition of the words "as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract" in the Code of 1906 gave the statute the effect of writing out policy limitations on the authority of a special agent and making him the *alter ego* of the company for the performance of the acts specified in the section.

The court expressly overruled the *Capital Paint & Glass Co.*,[69] *Ruble*,[70] *Kemp*,[71] and *Vaughan* cases.[72] The court distinguished the *Stewart*,[73] *Clark*,[74] *Lester*,[75] *Thornhill*,[76] *Singleton*,[77] and *Loving*,[78] cases in the following manner:

> " . . . they do not deal with limitations in a policy of insurance on the authority of a special agent, but simply charge the insurance company issuing the policy with notice of facts known to the agent when the policy was delivered by him—a liability or burden 'imposed by law' on an agent's principal."[79]

This may indicate that the court considers the effect of its decision to be that the statute does not prevent an insurer from binding the insured by a limitation on the authority of a special agent to vary the policy by his *acts* or *agreements;* but that the statute is still effective to create a principal-agent relationship and that the *knowledge* acquired by an agent while performing the acts enumerated in the section is binding upon the insurer. If the court clings to this view, though grounds for the distinction are very elusive, the statute will still be of material assistance to policy-holders.

It was argued by counsel that the *Vaughan*[80] and *Kemp*[81] cases were decided before the re-enactment of the statute in the Code of 1930 and that the law-makers thereby adopted that construction of the statute. Judge Smith held that there was no merit in the contention, and said that, even if it were a valid argument, it would only serve to render the statute unconstitutional as an invasion of the liberty of contract guaranteed by the Fourteenth Amendment of the Federal Constitution and section 14 of the Mississippi Constitution.

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[68]Home Ins. Co. v. Thornhill, 165 Miss. 787, 795, 144 So. 861, 862 (1932), discussed *supra*, p. 230.

[69]Capital Paint & Glass Co. v. St. Paul Mercury Indemnity Co., 180 Miss. 341, 176 So. 729 (1937).

[70]Interstate Life & Accident Ins. Co. v. Ruble, 160 Miss. 206, 133 So. 223 (1931).

[71]Lamar Life Ins. Co. v. Kemp, 154 Miss. 890, 124 So. 62 (1929).

[72]Mutual Life Ins. Co. of New York v. Vaughan, 125 Miss. 369, 88 So. 11 (1921).

[73]Stewart v. Coleman & Co., 120 Miss. 28, 81 So. 653 (1919).

[74]Hartford Fire Ins. Co. v. Clark, 154 Miss. 418, 122 So. 551 (1929).

[75]Aetna Ins. Co. v. Lester, 170 Miss. 353, 154 So. 706 (1934).

[76]Home Ins. Co. v. Thornhill, 160 Miss. 787, 144 So. 861 (1932).

[77]Aetna Ins. Co. v. Singleton, 174 Miss. 556, 164 So. 13 (1935).

[78]St. Paul Fire & Marine Ins. Co. v. Loving, 163 Miss. 114, 140 So. 727 (1932).

[79]Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 703, 198 So. 625, 627 (1940).

[80]Mutual Life Ins. Co. of New York v. Vaughan, 125 Miss. 369, 88 So. 11 (1921).

[81]Lamar Life Ins. Co. v. Kemp, 154 Miss. 890, 124 So. 62 (1929).

Judge Ethridge dissented, holding to his former view of the purpose and effect of the statute:

> "The majority opinion sets out some purposes of the statute, but not all. One purpose of the statute is to make the insurance companies responsible for the acts of their agents, and to cause them to select as their agents qualified and proper persons."[82]

The only case decided since the *Saucier* case was that of *St. Paul Mercury Indemnity Co. v. Ritchie*.[83] It involved the adjustment provisions of section 5196. The facts were so nearly identical with the *Capital Paint & Glass Co.* case[84] that Judge McGehee was of the opinion that the decision of that case would be completely controlling, if it had not been overruled by the *Saucier* case. Thus, we see the doctrine of the *Saucier* case applied to an agreement made by an adjuster in contravention of policy limitations upon his authority in that respect.

What the court will hold as to the effect of the *Saucier* case on the imputation of an agent's knowledge to his principal remains a matter of conjecture. Will the court hold that policy limitations are effective to prevent a special agent's knowledge being imputed to the principal? It is to be noted that the court expressly overruled several cases in the *Saucier* case, but distinguished the case of *Home Ins. Co. v. Thornhill*.[85] In that case the court held, as pointed out above,[86] that the delivery of a fire insurance policy by a soliciting agent who had knowledge that the insured's title was not as represented in the application was the act of the company, although the application provided that no statement or act of any agent not contained in the policy should be binding on the company. As to the effect of section 5196, the court said:

> "This provision writes out of the application and the policy the limitations on the common law liability of the appellant growing out of Moseley's acts in obtaining the application for the policy." [87]

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[82]Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 706, 198 So. 625, 628 (1940).

[83]190 Miss. 8, 198 So. 741 (1940).

[84]Capital Paint & Glass Co. v. St. Paul Mercury Indemnity Co., 180 Miss. 341, 176 So. 729 (1937).

[85]160 Miss. 787, 144 So. 861 (1932).

[86]*Supra* at p. 230.

[87]Home Ins. Co. v. Thornhill, 160 Miss. 787, 795, 144 So. 861, 862 (1932).

*But see* Lamar Life Ins. Co. v. Kemp, 154 Miss. 890, 124 So. 62 (1929), discussed *supra*, p. 229, which was expressly overruled in the *Saucier* case. The facts of that case were almost identical with those of the *Saucier* case. The court held that the statute was effective to make the agent's delivery of the policy, with knowledge that the first premium had not been paid, binding on the insurer. The court said that "it was a delivery by appellant, with the imputed *knowledge* that the first premium had not been paid." (Italics added.)

*Query:* Will it not be possible to argue, under the distinction drawn in the *Saucier* case, that every act of the agent with the exception of express agreements is simply the act of the insurer with imputed knowledge that there has not been compliance with the policy or application?

It seems that, if this case is still good authority, under the distinction drawn in the *Saucier* case between the acts and knowledge, policy limitations on an agent's authority will not be effective to prevent the court from imputing his knowledge to the principal.

III. *Decisions of Foreign Courts on Similar Statutes from Other Jurisdictions.*[88]

Statutes of a nature similar to section 5196 have been enacted in a majority of the states,[89] and the constitutionality of such statutes has been upheld by the Supreme Court of the United States.[90] Because of the varying provisions of these statutes, a detailed study of the decisions thereon is impracticable in a discussion of this scope.

A case having profound effect on subsequent decisions of the United States Supreme Court, the lower Federal courts and a few of the state courts is *Mutual Life Ins. Co. v. Hilton-Green.*[91] The court held that the Florida statute was not effective to impute a soliciting agent's knowledge of insured's fraud to the insurance company. The element of fraud in the case influenced the court to a large degree and the case was distinguished on this ground by the Supreme Court the next year in *America Fire Ins. Co. v. King Lumber & Manufacturing Co.,*[92] where the court utilized the statute to make a broker the agent of the insurer rather than of the insured. Yet the *Hilton-Green* case has been often cited and followed in cases where no fraud was involved.[93] It is specially to be noted, however, that this case is no longer controlling in the federal courts since the decisions of *Erie Railroad Co. v. Tompkins.*[94]

An incomplete survey of the decisions of the state courts indicates that their attitude toward such statutes is much more liberal. The court has given the statute the effect of raising a soliciting agent to the level of a

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[88]The material included in this section is by no means to be considered as an exhaustive study of similar statutes from foreign jurisdictions. Cases have been selected from states at random and no attempt has been made to include all the states having such statutes.

No statutory citations are included. These may be obtained from the cases as reported.

[89]2 COUCH, INSURANCE (1929) 1401.

[90]American Fire Ins. Co. v. King Lumber & Manufacturing Co., 250 U. S. 2, 39 Sup. Ct. 431, 63 L. ed. 810 (1917); Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 10 Sup Ct. 87, 33 L. ed. 341 (1889).

[91]241 U. S. 613, 36 Sup. Ct. 676, 60 L. ed. 1202 (1916).

[92]250 U. S. 2, 39 Sup. Ct. 431, 63 L. ed. 810 (1917).

[93]Sun Insurance Office v. Scott, 284 U. S. 177, 52 Sup. Ct. 72, 76 L. ed. 229 (1931) (Ohio statute); Fountain & Herrington, Inc. v. Mutual Life Ins. Co. of New York, 55 F. (2d) 120 (C. C. A. 4th, 1932) (North Carolina statute); Keeton v. Jefferson Standard Life Ins. Co., 5 F. (2d) 183 (C. C. A. 4th, 1925) (Virginia statute); Fidelity-Phenix Fire Ins. Co. v. Handley, 296 Fed. 902 (C. C. A. 5th, 1924); Maryland Casualty Co. v. Campbell, 255 Fed. 437 (C. C. A. 5th, 1919) (Florida statute).

*Contra:* Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311, 48 Sup. Ct. 512, 72 L. ed. 895 (1928) (Oregon statute); Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. ed. 341 (1889) (Iowa statute).

[94]304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1938).

general agent as to the things he is employed to do in Iowa,[95] Kentucky,[96] Maine,[97] Michigan,[98] Montana,[99] and Wisconsin.[100] An opposite result has been reached in Massachusetts[101] and Texas[102] for reasons similar to those given in the *Saucier* case—that the purpose of the statute is to implement other statutes in the state's regulation of insurance agents.

## IV. *Summary*

At common law in Mississippi it may be said that an agent is to be considered as the general agent of the company—*i.e.,* as an agent who stands in the place of his principal in all his dealings with the insured—, only when he has actual authority from the principal to make contracts of insurance or to issue policies,[103] or when, in the absence of express authority, the principal has placed the agent in such a position that the insured is justified in believing that he has such actual authority.[104] The burden is always upon the insured to prove the authority of the agent, whether it be actual or apparent.[105] If the attempt be to prove apparent authority, the plaintiff must show that he was misled, not by acts of the agent, but by acts of the insurer.[106] Limitations upon the authority of any particular agent to waive or modify provisions of the application or policy are binding upon the insured, if they are included in the application.[107] However, the company cannot provide that *no* officer or agent of the company can waive or modify the provisions of the contract.[108] Nor can the insurer rely upon a provision in the application, so as to preclude the insured from proving that the persons dealing with him were agents of the insurer and not his own agents.[109]

How does the "pre-Saucier" construction of section 5196 vary the common law? As to acts or agreements of a special agent and knowledge acquired by him after delivery of the insurance policy, and before any adjustment of the loss thereunder is undertaken, the law is the same. The statute applies only before delivery is completed and during

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[95]Cooper Wagon & Buggy Works v. National Ben Franklin Ins. Co., 188 Iowa 425, 176 N. W. 309 (1920).

[96]Mutual Ben. Health & Accident Ass'n v. Smith, 257 Ky. 288, 77 S. W. (2d) 957 (1935).

[97]Bradbury v. Insurance Co. of State of Pennsylvania, 119 Me. 417, 111 Atl. 609 (1920).

[98]Schaeffer v. East & West Ins. Co. of New Haven, Conn., 260 Mich. 220, 244 N. W. 454 (1932).

[99]Baker v. Union Assur. Soc. of London, Ltd., 81 Mont. 281, 264 Pac. 132 (1928).

[100]Suschnick v. Underwriters' Casualty Co., 211 Wis. 474, 248 N. W. 477 (1933).

[101]Wood v. Firemen's Ins. Co., 126 Mass. 316 (1879).

[102]Hartford Fire Ins. Co. v. Walker, 94 Tex. 473, 61 S. W. 711 (1901).

[103]Rivara v. Queen's Ins. Co., 62 Miss. 720 (1885).

[104]Germania Life Ins. Co. v. Bouldin, 100 Miss. 660, 56 So. 609 (1911).

[105]New York Life Ins. Co. v. O'Dom, 100 Miss. 219, 56 So. 379 (1911).

[106]*Ibid.*

[107]*Ibid. Query:* Is it possible for an insurance company so to provide in its applications for insurance that no resident agent in the state of Mississippi will have the power to waive any provision of the policy or to estop the company by his actions or words?

[108]London Guarantee & Accident Co. v. Mississippi Central R. R., 97 Miss. 165, 52 So. 787 (1910).

[109]Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521 (1877).

the adjustment of losses under the policy.[110] But when an insurer permits a person to undertake the performance of any of the acts enumerated in the section at the time delimited therein, the statute acts upon the relationship and converts the person performing the acts into the general agent of the insurer for the performance of such acts and imputes to the insurer acts done by the person,[111] and knowledge acquired by him,[112] in all his transactions with the insured. It is not necessary for the insured to prove misleading acts on the part of the insurer. The only burden upon him is to prove that the alleged general agent performed one or more of the acts listed in section 5196 with the approval of the company. The statute provides a conclusive presumption as to the remainder of the fact of general agency.[113] The statute removes from the consideration of the court any limitations upon the agent's authority that conflict with the statute.[114]

What is the present state of the law under the court's construction of section 5196 in the *Saucier* case? It seems clear that the statute is no longer effective to impute express agreements of special agents to the insurer in contravention of policy provisions denying such authority. This is the only definite conclusion to be drawn from the case.

The court intimates in the distinction drawn between prior decisions on the section[115] that the statute is still effective to convert a person acting within the terms of the statute into *an* agent of the company and that any knowledge acquired by such person will be imputed to the insurer. Whether policy limitations upon the authority of a special agent will effect the power of the courts to impute his knowledge to the insurer is yet to be determined. Pointers toward either conclusion appear in the *Saucier* case.[116]

## V. *Conclusion*

What was the true purpose of the legislature in enacting section 5196? Certainly it can be agreed that the law-makers had in mind the regulation

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[110]Travellers' Fire Ins. Co. v. Price, 169 Miss. 531, 152 So. 889 (1934). *Query:* Is the rule the same where the policy is delivered upon a condition subsequent?

[111]Mutual Life Ins. Co. v. Vaughan, 125 Miss. 369, 88 So. 11 (1921); Lamar Life Ins. Co. v. Kemp, 154 Miss. 890, 124 So. 62 (1929); Interstate Life & Accident Co. v. Ruble, 160 Miss. 206, 133 So. 223 (1931); Capital Paint & Glass Co. v. St. Paul Mercury Indemnity Co., 180 Miss. 341, 176 So. 729 (1937).

[112]Stewart v. Coleman & Co., 120 Miss. 28, 81 So. 653 (1919); Hartford Fire Ins. Co. v. Clark, 154 Miss. 418, 122 So. 55 (1929); Home Ins. Co. v. Thornhill, 160 Miss 787, 144 So. 861 (1932); St. Paul Fire & Marine Ins. Co. v. Loving, 163 Miss. 114, 140 So. 727 (1932); Aetna Ins. Co. v. Lester, 170 Miss. 353, 154 So. 706 (1934); Aetna Ins. Co. v. Singleton, 174 Miss. 556, 164 So. 13 (1935).

[113]Interstate Life & Accident Ins. Co. v. Pannell, 169 Miss. 50, 152 So. 635 (1933).

[114]Home Ins. Co. v. Thornhill, 165 Miss. 787, 144 So. 861 (1932).

[115]See discussion, *supra,* pp. 232-236.

[116]See discussion, *supra,* p. 235, at note 87; and the query in note 87.

It is to be noted that the attorneys in the *Saucier* case did not argue the question of the company's being estopped by the agent's knowledge. Under the distinction drawn in the *Saucier* case between knowledge acquired by an agent and acts done by an agent, perhaps the best attack for the insured is to plead that the company is estopped by its agent's knowledge; not that the agent has waived the provisions of the policy by his representations.

of insurance companies and their agents. Did they intend that this end should be accomplished solely by giving section 5196 the effect of implementing the criminal and civil penal provisions of Chapter 127 of the Code? Or did they intend that section 5196 should have the further effect of broadening the civil liability of insurance companies for acts of careless or unscrupulous local agents as a further sanction to force companies to employ capable and reliable agents? Reasoning juridically, we can reach either result, as did Judge Smith in the *Saucier* case and the *Thornhill* case, and as have the courts of the various jurisdictions.

The question is therefore one of policy, but one which the court has the power to decide. It is a fact so well known that the courts might well take judicial notice of it that policy holders rarely read the stipulations and conditions printed in microscopic type in their policies and applications for policies. Even if they should read them, it is beyond their ability to interpret the proper legal effect. The mass of insurance litigation bears witness to the fact that even trained legal minds cannot agree on many points arising from such stipulations.

On the other side of the balance we have the mandate of good public policy that there should be freedom of contract. But does the view of the *Saucier* case look toward this end? Can we say that there is freedom of contract where an expert drafts an instrument designed solely for self-protection and submits it to a relatively ignorant person with the single option of "Take it or leave it?"[119]

The decision of this issue of policy lies with the court and will determine whether section 5196 is to be given its most potent effect as a weapon to force insurance companies to hire agents whom they know will deal honestly and intelligently with the public and with the company.

*Richard Lord*

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[117]Saucier v. Life & Casualty Ins. Co. of Tennessee, 189 Miss. 693, 198 So. 625 (1940).

[118]Home Ins. Co. v. Thornhill, 165 Miss. 787, 144 So. 861 (1933).

[119]An expanding attitude of the courts toward what constitutes freedom of contract is exemplified by the case of West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 Sup. Ct. 578, 81 L. ed. 703 (1936), overruling Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 294, 67 L. ed. 785, 24 A. L. R. 1238 (1923). The *Parrish* case held that the state of Washington could regulate minimum wages by legislation. This decision shows a recognition by courts that there is no freedom of contract where the contracting parties are not bargaining on the same level; that the weaker party deserves protection from the stronger party. The analogy to the insured-insurer relationship is apparent.

*See* Triplett, *The Insurance Contract—Should a Duty to Read Be Imposed on the Insured?* (1937) 9 Mississippi Law Journal 293.

## Conflict of Laws in Mississippi as to Contracts

### *Introduction*

It must be recognized that a Conflict of Laws problem in the field of contract arises wherever there is any kind of contact between a contract or the parties thereto and more than one state.[1] The contacts of a contract with a state may comprise among others: (a) The place where the contract is made; (b) The place where it is to be performed; (c) The place where the subject matter of the contract is located; (d) The place where the security for the performance of the contract is located; and (e) The state with reference to which the parties contracted. The contacts between the parties and a state may comprise among others: (a) The domicil or residence of the parties; (b) The physical location of the parties at the time the contract is made; and (c) The place or forum in which the action on the contract is brought. In deciding any given question in the field of contracts, the court of the forum may refer to the dispositive[2] rules of the law of contracts of any one of these possible contact points. It is the purpose of this note to examine the Mississippi cases in order to determine the various situations in which the courts of this State will refer the solution of a particular problem to the contract law of one of these states.

Examination of the cases and of the pronouncements of the text writers in the field of Conflict of Laws shows that the problems may be divided into several categories. Thus Beale considers the problems of *validity, capacity, form, obligation, and performances.*[3] Goodrich discusses the problems under the heads of *capacity, formal validity, essential validity,* and *performance.*[4] Stumberg makes much the same division, except that he seems to consider the problem of *validity indivisible.*[5] A striking similarity of subdivision is found in the writings of Story,[6] Dicey,[7] Wharton,[8] and Cheshire,[9] the great English authority.

Careful reading of these writers' opinions and analysis of the cases make it appear that these detailed subdivisions are, to say the least, unnecessarily complicated. It seems that the courts, and the writers, have in fact allocated any given problem to one of two fields, *obligation* and *performance,* and have applied different systems of dispositive laws of

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[1]The word "state" will herein be used to refer to any independent judicial unit, often called a "jurisdiction" and the word "State" (capitalized) to refer to a State of the United States of America. See, Taintor, *Universality in the Conflict of Laws of Contracts,* 1 La. L. Rev. 695, 696.

[2]By "dispositive" laws it is intended to describe the rules of law which determine the nature of rights arising from fact-groups, *i.e.,* which determine the terms of the judgment rendered in a particular case. These rules are variously referred to by others as "municipal," "domestic," or "internal" law. See, Taintor, *loc cit. supra* note 1.

[3]Beale, Conflicts of Law (1935) § 332.1.

[4]Goodrich, Conflicts of Law (1938) 258.

[5]Stumberg, Conflict of Laws (1937) 220-221.

[6]Story, Conflict of Laws (8th ed.) 282.

[7]Dicey, Conflict of Laws (5th ed. 1932) 634.

[8]Wharton, Conflict of Laws (3rd ed. 1905) 860.

[9]Cheshire, Private International Law (2nd ed. 1938) 243. [These works will be hereinafter cited by the name of the author alone.]

contracts to the two fields.[10] Thus, for example, Beale is of the opinion that questions of validity, capacity, forms, and obligation are to be decided by the laws of the place where the contract is made,[11] and that questions of discharge by performance are to be decided by the law of the place where performance was, or should have been rendered.[12]

It is believed that the Supreme Court of Mississippi has made the same division into two categories, *obligation* and *performance,* and that the following analysis of the cases in this State show that this is the fact.

In order to show this, however, the cases which have been decided in Mississippi have been treated under the separate heads of capacity, form, validity of obligation, extent of obligation, and performance, and it is submitted that the cases in each of the first four subdivisions make it clear that in considering problems arising in each subdivision, the court has used the same technique in determining the identity of the system of contracts rules to be applied, and that this, in turn, makes it clear that the court of this State makes the suggested division into only two categories.

In this discussion the word "obligation" is used to refer to an enforceable promise, including the nature and extent of that promise; and the word "performance" is used to refer to those agreed acts which may have effect to discharge the obligation. For example, if the defendant promises that inspection before shipment will be made by an adult, determination that an adult is a person who is *sui juris* is a matter of obligation, while determination that the person who actually inspected was *sui juris* is a matter of performance. Thus, the contract rule of the State whose contract laws govern questions of obligation is applied to determine that the promise was that a person *sui juris* should inspect, and the rules of the state in which the inspection was made are applied to determine that a person of 18 or any other age is, or is not, *sui juris.*

## *Obligation*

### A. Capacity

There are two competing rules with respect to the determination of the capacity of a person to make a binding contract. There is the civil law rule which is to the effect that such capacity is a function of the personality and is, therefore, to be determined by the rules of the nationality or the domicil of the person.[13] In this country, however, only the State

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[10]*Caveat:* It may be that "form" and "legality" constitute a category independent of obligation and performance. As to legality, see Note (1941) 13 MISSISSIPPI LAW JOURNAL 632.

[11]It is to be observed that Goodrich is of the same opinion as Beale, and that Stumberg would apply the law governing the contract to some of his subdivisions and the law of the place of performance to others. In other words, Stumberg also looks to only two different sets of dispositive laws.

[12]BEALE, § 361.2.

[13]BEALE, § 333.3; see also, Taintor, *supra* note 1 at 706; GOODRICH, p. 265; STUMBERG, p. 215 and cases there cited.

of Louisiana applies this rule.[14] In the other States, capacity to contract is treated as a function of the transaction, rather than a function of the personality, and the contract law of the place of making, the place of performance, and "place intended by the parties," or some other state with which the transaction may have a contact are applied. The reason for this rule is said to be found in the great commercial expansion in this country, and in the reduction of the importance of distance in business transactions as a result of the existence of so many independent states in one country and of the development of means of communication.

In 1870, in *Partee v. Silliman*,[15] the question of the contractual capacity of a married woman reached the court. In this case the court referred to the fact that the note in suit was dated in Louisiana and was payable there and said that "as a contract, it is domiciled in that state." It continued with remarks to the effect that "generally, a contract for its validity, obligation, and construction, is to be governed by the law of the place where made," and that "when the *locus contractus* and the place of performance are the same, there is no difficulty as to the law that applies." It is true that the court also mentioned the fact that the parties were resident in Louisiana and that "the weight of authority among civilians, is perhaps in favor of the law of the domicil." It seems, however, that this was merely by way of showing erudition, since it was later said: "The foreign forum[16] refers to the *lex loci contractus* for the validity and construction of the act."

Two years later, in *Bank of Louisiana v. Williams*,[17] the court made its position much clearer when it said: "The general rule is, that *lex loci contractus* governs as to validity and construction; unless, indeed, some other state or country is appointed by the parties as the place of performance, and the contract is made with special reference to its law." It continued with an express repudiation of the rule that capacity is governed by the law of the domicil of the party,[18] and concluded this portion of the opinion with a statement that contracts may be "located" in a country or state when, by appointing performance there, the parties may be supposed to have that law in view.[19] The court determined the married woman's capacity under the laws of Louisiana and referred to her domicil in Mississippi only for the purpose of deciding that a provision in the bank's charter conferring capacity upon a particular class of married women to contract was intended to give capacity only to Louisiana domiciliaries having lands in Louisiana.

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[14]Baer Bros. v. Terry, 108 La 597, 32 So. 353, 92 Am. St. Rep. 394 (1902); Marks v. Loewenberg, 143 La. 196, 78 So. 444 (1918). In the latter case the Louisiana Court said: "A minor, a married woman, a prodigal, or a spendthrift, a person non compos mentis, or any other person who is deemed incapable of transacting business in the place of his or her domicil will be deemed incapable everywhere. . . ."

[15]44 Miss. 272 (1870).

[16]The forum here referred to is that of Mississippi.

[17]46 Miss. 618 (1872).

[18]*Id.* at 624. "It is not true, generally, that the 'status' and 'capacity' of persons in foreign countries is determined by the law of their domicil."

[19]*Id.* at 625. "Contracts may be 'located' in a country or state other than that in which they are made, as when performance is appointed there, and the parties may be supposed to have had in view that law."

Soon thereafter, in *Shacklett v. Polk,*[20] the court for the first time enunciated the rule which appears to be the present doctrine in this State. There, a married woman, domiciled in Tennessee, executed and made payable a note in Tennessee, as part of a larger contract to be performed in Mississippi. The court applied the Mississippi law on the ground that where "performance is to be made, in another jurisdiction, the parties may be justly presumed as referring to its law as the standard, both of validity and construction."

In the most recent case on the subject, *Greenlee v. Hardin,*[21] the maker of the note was a married woman, domiciled in Mississippi. The note was made in Mississippi, but was dated and made payable in Florida. Under the laws of contracts of Mississippi, the defendant was capable; while under the laws of contracts of Florida, the defendant was incapable of making the contract. The court applied the laws of Florida, saying that: "Where a promissory note is executed in one state, payable in another, the parties thereto will be presumed to have contracted with reference to the law of the state of payment; and therefore the nature, validity, interpretation, and effect of the note will be governed thereby."

From the above it appears to be very clear that the Mississippi Supreme Court has determined that the law to be applied to govern a person's capacity to contract is the law of that state where the transactional contact points were "located" and not the state in which the person whose capacity was in issue was domiciled. This statement is made for the reason that in all of the cases the domicil of the person whose capacity to contract was in question was a state other than the one whose laws were applied and held to govern. Of course, it is necessarily true that situations may arise wherein the domicil of the person whose capacity is in question may be the same state in which the transactional contact points are located. In such event, however, the application of the laws of that state would in no wise militate against this view.

### B. Form

"Questions concerning the form in which an agreement is cast may arise as matters of procedure or 'remedy' or as a substance or 'right'."[22] Hence, if a question of form arises as a matter of procedure, it may well be that the promises of the parties will not be enforced though valid both by the laws of the forum and where made, for the reason that the contract may not meet certain procedural requisites which are conditions precedent to its admission in evidence.

It is not the purpose of this note, however, to discuss whether *form* is to be treated as a matter of *right* or of *remedy,* but only to discuss the identity of the contract law to be applied in the event that the Mississippi Supreme Court treats the Statute of Frauds and other questions of form as matters of substance rather than as matters of procedure.[23] Mississippi,

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[20]51 Miss. 378 (1875).
[21]157 Miss. 229, 127 So. 777, 71 A. L. R. 741 (1930).
[22]GOODRICH, p. 269.
[23]The question as to whether the Statute of Frauds is properly to be treated as substantive or procedural is discussed in Note, *The Mississippi Statute of Frauds in the Conflict of Laws,* p. 256 *infra.*

like the majority of other American States, has, as yet, considered the question of form only while construing the Statute of Frauds, and the result of the cases is by no means clear as to the identity of the contract law to be applied.

In the well considered case of *Fox v. Matthews,*[24] which was decided at the time when the Mississippi Supreme Court apparently applied the law of the place of performance as a rule of law in matters of obligation, the court applied the law of Louisiana to govern an oral compromise which had been made in Mississippi to be performed in Louisiana. But dicta in the much later cases of *Craft v. Lott*[25] and *Hooker v. McRae,*[26] tend somewhat to give the impression that in Mississippi a contract as to form must comply with the requisites of the place of making. This is especially true in the *Hooker* case, in which the court applied the law of Tennessee to an oral agreement which was made and was to be performed[27] in Tennessee, merely remarking in its opinion that: "This contract was made in Tennessee," and, "The contract is governed by the laws of the State of Tennessee." In the *Craft* case, however, as in the *Hooker* case, it is important to note that the place of performance did not appear to be presented or even considered by the court, as where the contract was to be performed was not mentioned in the decision nor in the briefs of counsel. Hence, it may well be the fact that the only contact points on which the parties relied were those determined by the place of making. If so, then it is not surprising that the court did not look to the law of any other place.[28]

But it can be perceived from the United States Supreme Court's decision in *Hall v. Cordell,*[29] and from *Canale & Co. v. Pauly & Co.,*[30] that in other states, and in the Federal courts before *Erie R. R. v. Thompkins,*[31] form is treated in the same manner as all of the other elements of obligation. For example, in both the *Hall* and the *Canale* cases, the courts applied the law of the place of performance to a contract made in another State on the ground that it was to be presumed that the parties intended the law of that place to govern; the United States Supreme Court in the former case saying: "Nothing in the case shows that the parties had in view, in respect to the execution of the contract any other law than the law of the place of performance." From the above, it is mainfest that courts other than the Mississippi Supreme Court have selected the same rule in determining a question of form as they have in determining what law is to control capacity to make a contract, as well as the other matters of obligation.

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[24]33 Miss. 433 (1857).
[25]87 Miss. 590 (1905).
[26]131 Miss. 899, 95 So. 744 (1923).
[27]It is apparent from a statement of the facts of the case that the contract was to be performed in the same state where made, but this fact was not mentioned by the court.
[28]If the contract in the *Craft* case was not to be performed in Mississippi, it was to be performed in Alabama, and neither in the briefs of counsel, as reported in 87 Miss. at 590-594, nor in the opinion of Justice Truly, is any Alabama case cited.
[29]142 U. S. 116, 12 Sup. Ct. 154, 35 L. ed. 956 (1891).
[30]155 Wis. 541, 145 N. W. 372 (1914).
[31]304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487 (1938).

In view of the Mississippi decisions on this point, there appears to be no good reason why the court should not refer to the law of the place of performance as the place intended by the parties as being the law to govern questions of form as well as questions of capacity. In fact, excluding the dictum found in *Hooker v. McRae,* the only contrary case is *Craft v. Lott,* in which the question apparently was not presented to the court. At least, it seems that Mississippi is not bound by precedent to an adoption of the law of the place of making by way of a mechanical rule to be applied in all instances whenever a question as to the law governing form arises.

### C. Validity

In Mississippi, problems concerning the validity of contracts have been raised through various contentions. Of these, the most frequent is that the contract was usurious. Other direct attacks upon the validity of a contract have been: (a) that the contract sued on was tainted with fraud; (b) that the contract was made on a Sunday; (c) that the consideration of the contract was illegal; (d) that there was failure of consideration; and (e) that one party failed to comply with statutory conditions precedent to doing business.

The most vivid of the "usury" cases is *Shannon v. Georgia State Building & Loan Assn.*[32] In this case there was a note which was executed in Mississippi and secured by a mortgage on land in Mississippi. The note stated that it was payable in Georgia, but actually, all payments had been made in Mississippi. In an action to recover usurious interest paid to the foreign corporation, which had established local offices and had qualified to do business in Mississippi, the court applied the law of Mississippi, saying:

> "The chief point of contention is whether this is a Georgia or a Mississippi contract. It is true that the notes were payable in Georgia, but the mortgage was on land in Mississippi, and the debtor lived in Mississippi, where alone the mortgage could have been enforced. All the payments through a series of years, were actually made in Mississippi, instead of Georgia, . . . and it is manifest it was intended they should be made here."[33]

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[32]78 Miss. 955, 30 So. 51 (1901). Usury cases applying the law of the place of performance are Martin v. Martin, 1 Sm. & M. 176 (Miss. 1843); Henry v. Halsey, 5 Sm. & M. 573 (Miss. 1845); Robb v. Halsey, 11 Sm. & M. 140 (Miss 1848); Houston v. Keith, 100 Miss. 83, 56 So. 336 (1911); Dodds v. Pyramid Securities Co., 165 Miss. 269, 147 So. 328 (1933); *but see* Brown v. Freeland, 34 Miss. 181 (1857) wherein the court applied the law of Mississippi to a note payable in New York. Usury cases applying the law of the place of making and performance are Swett v. Dodge, 4 Sm. & M. 667 (Miss. 1845); Knox v. Bank of the United States, 27 Miss. 655 (1854); Armistead v. Blythe, 20 So. 298 (Miss. 1896); Commercial Bank v. Auze, 74 Miss. 609, 21 So. 754 (1897); Kendrick v. Kyle, 78 Miss. 278, 28 So. 951 (1900); Castleman v. Canal Bank and Trust Co., 171 Miss. 291, 156 So. 648 (1934).

[33]78 Miss. 955, 964, 30 So. 51, 52 (1901): expressly followed in National Mutual Bldg. & Loan Ass'n. of N. Y. v. Brahan, 80 Miss. 407, 31 So. 840 (1902) where, however, the foreign corporation had no local office or general agent in Mississippi.

A similar technique may be observed in *Levy & Sons v. Jeffords,*[34] where the court observed that the note in question was payable in Louisiana, but was made in Mississippi and secured by a mortgage on Mississippi land which contained a stipulation to the effect that Jeffords should annually ship to Levy his cotton crop raised in this state. In an action on the note by Levy, the court applied the law of Mississippi on the ground that: "The larger part of the contract, in fact all of it except the mere place of payment of the money, was to be performed in this state and not in Louisiana."[35]

In *Security Finance Co. v. Sharpe,*[36] an action was brought upon certain notes. The defense was that the notes had been fraudulently obtained to the knowledge of the plaintiff. The court applied the law of Iowa, remarking:

> "The contract between the appellant and the Brenard Manufacturing Company for the purchase of certain radios . . . was consummated upon its approval at the office of the said Brenard Manufacturing Company, at Iowa City, Iowa, and the notes executed by the appellee were payable at Iowa City, Iowa."[37]

A similar attitude on the part of the court, insofar as its attention is directed to certain contact points, is illustrated in *Moody & Co. v. Boyle Gin Co.*[38] There an action was brought on a contract which the defendant contended was void because it was executed and delivered on a Sunday. The court applied the law of Arkansas on the ground that "The contract was made, delivered, and was to be performed in the state of Arkansas."[39]

Again in *Ivey v. Lalland,*[40] where the contention was that a note in question was void because it had been executed in consideration of a loan of Confederate money which had been outlawed by the Federal government, the court applied the law of Louisiana: "As the contract . . . was made in the State of Louisiana, and in terms to be performed there."

In *Lienkauf Banking Co. v. Haney,* [41] an action was brought on a note which was executed in Mississippi and payable in Alabama. Under the laws of Mississippi, the note in question was subject to the defense of failure of consideration, which defense the defendant set up. The

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[34]141 Miss. 818, 105 So. 1 (1925).

[35]Other cases decided upon the larger part of the contract doctrine are the following: Shacklett v. Polk, 51 Miss. 378 (1875); Read v. Brewer, 16 So. 350 (Miss 1894); Dodds v. Pyramid Securities Co., 165 Miss. 269, 147 So. 328 (1933).

[36]152 Miss. 286, 119 So. 829 (1928).

[37]*Id.* at 290, 119 So. at 830.

[38]180 Miss. 523, 177 So. 654 (1937).

[39]*Accord:* McKee v. Jones, 67 Miss. 405, 7 So. 348 (1890); Strouse v. Lanctot, 27 So. 606 (Miss. 1900); See also, Note (1941) 13 MISSISSIPPI LAW JOURNAL 632.

[40]42 Miss. 444 (1869); *but see* Brown v. Nevitt, 27 Miss. 801 (1854) where the court, in considering a similar contention, applied the law of Mississippi to a note payable in Louisiana.

[41]93 Miss. 613, 46 So. 626 (1908); *accord:* Fellows v. Harris, 12 Sm. & M. 462 (Miss. 1849); Glenn v. Thistle, 23 Miss. 42 (1851); First National Bank of Iowa City v. McGrath, 111 Miss. 872, 72 So. 701 (1916).

court applied the law of Alabama, "In view of the fact that these notes provide on their face that they shall be negotiable and payable at the Lienkauf Banking Co., of Mobile, Alabama."

In *Hart v. Livermore Foundry & Machine Co.*,[42] an attempt was made to subject to a creditor's lien lumber which had been cut in Mississippi under a contract made in Tennessee. Under the laws of Tennessee, the contract was void for non-compliance with the statutes concerning foreign corporations, but it was valid under the laws of Mississippi. The court applied the law of Mississippi, on the ground that the "lumber was to be cut . . ., was to be inspected and paid for, delivered and received here."

The discussion of questions concerning the validity of a contract has been made short for the reason that all of the authorities agree that validity is an element of obligation. For that reason, it has been thought that a detailed discussion of all available Mississippi cases on this particular point is unnecessary. The above cases have been stated in order to show that the apparent technique used by the Mississippi Supreme Court is to examine the contacts between the transaction and the various states, reach a conclusion as to the state in which a majority of the contact points, or the most important contact points, are located, and then apply the law of that state. This technique appears to be very similar to that used by the court in determining the identity of the law to be applied to questions of capacity.

### D. Nature and Extent of Contractual Obligation

In an action on a pre-marital contract which was made in the State of Tennessee in which certain property belonging to the wife was disposed of, the question arose as to the identity of the law to be applied in order to determine what persons should take under the contract.[43] The court recognized the problem as one of nature and extent of obligation and applied the law of the State of Tennessee on the ground that:

> "The instrument having been executed in Tennessee, by parties resident there at the time, and the marriage having taken place there, must be construed according to the laws of that state. The law of the place of the contract must determine its validity, and *govern the extent of its operation,* unless it were made with a view to its execution elsewhere."[44]

The court used a similar technique in deciding the effect of a pre-marital contract with respect to the right of the wife to bind her property, acquired by virtue of such contract, for debts contracted by the husband.[45] The court applied the law of Louisiana, denying the wife such right because of the fact that, "The slaves were the separate property of the wife in virtue of a marriage contract entered into between her and her husband in the State of Louisiana."

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[42]72 Miss. 809 (1895); *accord:* Swing v. Brister, 87 Miss. 516 (1905).
[43]Carrol v. Renich, 7 Sm. & M. 798 (Miss. 1846).
[44]*Id.* at 804. (Italics added).
[45]Andrews v. Jones, 32 Miss. 274 (1856).

The question as to the existence or non-existence of implied covenants in a lease has been treated by the court as a problem of nature and extent. Thus, in *Plaza Amusement Co. v. Rothenberg,*[46] an action was brought on notes which had been given in consideration of the execution of a lease of a Mississippi building. In its opinion the court stated that the notes were both executed and made payable in Louisiana, but applied the law of Mississippi instead, saying, "But the lease is on property situated in the State of Mississippi, and the lease is the consideration for the notes. The operation of the picture shows was necessarily in Meridian, Mississippi, and the carrying out of the lease is, we think, controlled by the law of Mississippi, and that law governs the transaction throughout."

Furthermore, questions in regard to the rights of holders in due course of negotiable instruments have also been recognized and treated by the court as problems involving the nature and extent of the contractual obligation. This question arose with respect to whether the payment of a mortgage to the original mortgagee operated as a discharge of the notes which the mortgage had been given to secure, the notes having been made in Mississippi, but payable in Louisiana.[47] The court held that it did not so act, applying the law of Mississippi, on the ground that, "The notes, although payable in Louisiana, were executed in this state and secured by a mortgage on property in this state. . . . The mortgage expressly provided that the negotiable instruments law of this state should control the rights and obligations of the parties."

Again, in an action by a holder in due course against the maker of promissory notes, the question arose as to whether the plaintiff would be subject to the equities which existed against the payee.[48] The notes involved were executed in Mississippi, but made payable in Louisiana. Under a Mississippi[49] statute, the maker could have asserted the prior equities, but not under the laws of Louisiana. The court applied the law of Louisiana, because, "The defendant, by making his note payable to his own order at New Orleans, and indorsing and delivering it to Thompson—the plaintiff's indorser—domiciled the transaction in Louisiana."

The question as to whether a person is or is not a holder in due course of a negotiable instrument has also arisen, and has been regarded by the court as a problem of nature and extent of obligation. In such a case,[50] the court, in a very short opinion, applied the law of Tennessee, merely remarking that, "The negotiations and contracts were had and made in the State of Tennessee."

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[46]159 Miss. 800, 131 So. 350 (1930).

[47]Adler v. Interstate Trust & Banking Co., 166 Miss. 215, 146 So. 107, 87 A. L. R. 347 (1932); National Mutual Bldg. & Loan Ass'n. of N. Y. v. Brahan, 80 Miss. 407, 31 So. 840 (1902).

[48]Harrison v. Pike Bros. Co., 48 Miss. 46 (1873). To the same effect are: Emanuel & Barnett v. White, 34 Miss. 56, 69 Am. Dec. 385 (1857); Miller v. Mayfield, 37 Miss. 688 (1859); Coffman v. Bank of Ky., 41 Miss. 212 (1866).

[49]Miss Code (1857) Art. 2, p. 355 allowed as against the indorsee the "benefit of all want of lawful consideration, failure of consideration, payments, discounts, sets-off, made or had against the paper previous to notice of assignment."

[50]Woodsen v. Owens, 12 So. 207 (Miss. 1892).

In an action by the payee of a bill of exchange against the drawer thereof, the drawee having refused to accept, the question arose with respect to the rights of the subsequent holder against the drawer.[51] The bill was drawn in Mississippi on a Louisiana drawee, but no place was shown at which the bill was to be paid by the drawer in case of non-acceptance. The court treated the existing problems presented for decision as questions of nature and extent, and applied the law of Mississippi stating that, "As between the drawer and payee, or subsequent holder, the contract of the drawer as to the nature and effect of the bill, is governed by the law of the place where the bill was drawn." It is evident from the opinion, however, that the law of Louisiana would have been applied to govern the nature and extent of the obligation had the bill been accepted by the drawee, as the court said, "If it had been accepted by the drawees, they would thereby have become bound to pay it according to the law of the place of acceptance, or the place of their commercial domicil, where it was addressed to them."

Again, it appears from the cases that the Mississippi Supreme Court has used the same technique in determining the identity of the contracts law to be applied to questions of nature and extent of obligation as it has in those cases wherein arose problems of capacity, validity, and possibly form.

*Conclusion*

Having shown that the Mississippi Supreme Court uses the same technique and follows the same approach in determining the identity of the contracts law to be applied to the different problems of capacity to contract, the validity, the nature and extent, and possibly the form of the contract, it now remains to examine the cases in order to discover the conflict of laws rule with respect to obligation.[52]

It appears that the period from 1843 to 1872 represented an era during which the Mississippi Supreme Court applied the law of the place of performance as a mechanical rule of law to govern all contracts that called for performance in a State other than where made.

In *Martin v. Martin*,[53] where action was brought on a promissory note which was made in Mississippi, but payable in Louisiana, the court first enunciated this principle, saying: "The first question presented for decision is, What law is to govern this contract? The answer is, the law of the place, where, by its terms, it is to be performed, which, in this instance, is Louisiana."[54] By the year 1872, however, it appears that the court had come to realize that instances might arise where the application of the law of the place of performance as a mechanical rule

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[51]Wood v. Gibbs, 35 Miss. 559 (1858).

[52]No distinction will be made among the cases with respect to the different elements of obligation concerned.

[53]1 Sm. & M. 176 (Miss. 1843).

[54]Martin v. Martin, 1 Sm. & M. 176, 177 (Miss. 1843). *Accord:* Henry v. Halsey, 5 Sm. & M. 573 (Miss. 1845); Swett v. Dodge, 4 Sm. & M. 667 (Miss. 1845); Robb v. Halsey, 11 Sm. & M. 140 (Miss. 1848); Emanuel & Barnett v. White, 34 Miss. 56, 69 Am. Dec. 385 (1857); Coffman v. Bank of Kentucky, 41 Miss. 212 (1866); Ivey v. Lalland, 42 Miss. 444 (1869); Allen v. Bratton, 47 Miss. 119 (1872); Har-

would not effect a desired or just result. While there was a reference in *Bank of Louisiana v. Williams* in 1872 to the making of a contract "with special reference to" the laws of the place of performance, this realization appears more clearly in 1875 in a case in which there was an action on a note made in Tennessee to be performed in Mississippi. The court did apply the law of Mississippi, but in so doing used language which purported to modify the strictness of the former rule by saying, "If performance is to be made, in another jurisdiction, the parties may justly be *presumed* as referring to its law as the standard, both of validity and construction."[55] Again, twenty years later, the court used the same kind of language in applying the law of the place of performance to a contract made in Tennessee to be performed in Mississippi on the ground that "Where, by the contract, a different place of performance is fixed, the presumption is that the parties, as they lawfully may do, contract with reference to the law of such place."[56]

The expression of this change in the attitude finds its culmination in a decision rendered by the court in 1901. In that year the court was confronted with the duty of deciding the identity of the contracts law to be applied in governing the obligation of a series of notes which were executed in Mississippi and expressly made payable in Georgia.[57] What had happened was that the plaintiff had borrowed money from a foreign corporation which had qualified to do business in this State, the debt being evidenced by the notes in question which were secured by a mortgage on Mississippi land. It was to be expected that the court would apply the law of Georgia, it being the stated place of performance, but the court applied the law of Mississippi, saying:

> "The chief point of contention is whether this is a Georgia or a Mississippi contract. It is true that the notes were payable in Georgia, but the mortgage was on land in Mississippi and the debtor lived in Mississippi, where alone the mortgage could have been enforced. All the payments, through a series of years were actually made in Mississippi, instead of Georgia, to the local treasurer here, and it is manifest it was intended they should be made here. . . . It is obvious that this foreign corporation had thus localized its Mississippi business within the State of Mississippi. . . . The contract is a Mississippi contract according to the real facts and the real intention of the parties. Courts look through all disguises to the real case made by the actual facts."[58]

In explaining and perhaps justifying the result reached, the court remarked further that:

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rison v. Pike Bros. & Co., 48 Miss. 46 (1873). It is to be observed that in Carrol v. Renich, 7 Sm. & M. 798 (Miss. 1846) the court expressed the same result, but by the use of a different kind of language in that they said that the law of the place of making was to govern "unless it were made with a view to its execution elsewhere." For cases using similar language, see also Partee v. Silliman, 44 Miss. 272 (1870); Bank of Louisiana v. Williams, 46 Miss. 625 (1872); Brown v. Freeland, 34 Miss. 181 (1857).

[55]Shackett v. Polk, 51 Miss. 378 (1875).

[56]Hart v. Livermore Foundry & Machine Co., 72 Miss 809 (1895).

[57]Shannon v. Georgia State Bldg. & Loan Ass'n., 78 Miss. 955, 30 So. 51 (1901).

[58]*Id.* at 964, 30 So. at 52. *Accord:* National Mutual Bldg. & Loan Ass'n. of N. Y. v. Brahan, 80 Miss. 407, 31 So. 840 (1902).

> "The general doctrine is, of course, well settled that the law of the place where the contract is to be performed, governs the contract; and the presumption that this contract was to be performed according to the laws of Georgia, simply because the notes were payable in Georgia, is at least, nothing but a mere presumption to that effect, subject to be overcome by proof that, in truth and in fact, they intended the money to be paid in Mississippi. When all there is, in a case like this, to show the intention was to perform the contract in a foreign state, is a mere specious recital in the notes, and over against this, and contrary to this, are all the other facts in the case, and the whole course of dealing between the parties, it would be an abdication of common sense on the part of any court, to find the real intention of the parties in the paper recital, instead of in the real facts of the case."[59]

It is apparent from the first sentence in this quotation that the court did not wish or intend its decision to overrule the previous cases which adopted the rule that the law of the place of performance was to be applied to question of obligation. It is submitted that the words here used by the court indicate only a feeling on its part that the intention of the parties was a significant factor, worthy of consideration. This conclusion is derived from the fact that the court refused to apply the law of Georgia upon discovering that Georgia was not the real place of performance.

Insofar as consistency in the use of the same type of language is concerned, this case appears to represent the court's present view, as is illustrated by the recent case of *Greenlee v. Hardin*.[60] This case appears to militate against the conclusion that the court is solely interested in ascertaining the identity of the contracts law which the parties subjectively intend shall govern their agreement. An action was brought on a promissory note which, for purposes of the decision, the court assumed had been executed in Mississippi, although it was actually dated and made payable in Florida. The court applied Florida law on the ground that:

> "The note here in question was not only payable in Florida, but it was dated there. The statement in the date line of the note that it was executed in Florida is, of course, only prima facie evidence that it was actually executed there; but it is very strong evidence that the parties intended thereby for the note to be governed by the law of that state, where payment was to be made. . . . By dating the note in Florida, and making it payable there,

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[59] *Id.* at 970, 30 So. at 54. It is to be noted that the court later in Lienkauf Banking Co. v. Haney, 93 Miss. 613, 46 So. 626 (1908); Houston v. Keith, 100 Miss. 83, 56 So. 336 (1911); and First National Bank v. McGrath & Sons Co., 111 Miss. 872, 72 So. 701 (1916), purported to apply the law of the place of performance as a mechanical rule of law, citing a number of authorities in support thereof. The *Shannon* case was not included among the precedents cited, but a close inspection of the cases relied upon reveals that the court, in a majority of them, referred to the intention of the parties.

[60] 157 Miss. 229, 127 So. 777, 71 A. L. R. 741 (1930).

> in the absence of other competent evidence to the contrary, the parties 'located' the contract in Florida and subjected it to the laws thereof."[61]

At first glance, it might be said that the above case is in decided conflict with the result reached in the earlier *Shannon* case, but analysis compels the contrary conclusion. It is submitted that the court, in the *Greenlee* case, as in the *Shannon* case, examined all of the contact points comprising the transaction, associated such contact points with one or the other of the two States involved, and then concluded that a majority of, or the more important of, the contact points were centered in one or the other State. Having reached such conclusion, the court then applied the law of that particular State. In other words, it appears that what the court did was to discover the location of "the center of gravity"[62] of the entire transaction and then to apply the law of that State.

For example, in the *Shannon* case the technique of the Mississippi court was to examine the transaction contacts with Mississippi and Georgia and to discover that the only connection between the contract and Georgia was the mere paper recital that the note was payable there. Actually, all of the contacts were with Mississippi, in that the note involved was made there, was secured by a mortgage on Mississippi land, the debtor was a Mississippian, the foreign corporation was domesticated in Mississippi, and the contract was partly performed and in fact wholly performable in Mississippi. Hence, due to the fact that all of the contact points were located in Mississippi, there should be no doubt as to the State where "the center of gravity" was to be found.

In the *Greenlee* case, the debtor was a Mississippian, and the court assumed for the purposes of the opinion that the note was in fact executed in Mississippi. But, over against this, the note purported to have been executed in Florida, in that it was dated there, the creditor was a Florida corporation, not domesticated in Mississippi, the note was given for the purchase price of Florida land, the note was stated to be made payable there, and it was assumed by the court that it actually was payable in Florida.[63]

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[61] *Id.* at 235, 127 So. at 778. *Accord:* Dodds v. Pyramid Securities Co., Inc., 165 Miss. 269, 147 So. 328 (1933).

[62] See, HARPER & TAINTOR, CASES ON CONFLICT OF LAWS (1937) 173, where it is said: "It seems, rather, that these courts examine all the circumstances which could be supposed to have influenced the actions of the parties, and find the most intimate contact at that place which might be characterized as the center of gravity of the circumstances."

[63] It is true that in the *Greenlee* case the court spoke of the intention of the parties to have the Florida law apply. It is submitted, however, that it is improper for the court to assume that the party who will lose by the non-enforceability of the contract ever intends to have applied the law which will make the contract unenforceable. Furthermore, it does not seem proper for the court to impute to the party who will gain thereby, a dishonest intention to gain an advantage which will not have to be paid for. *See* Canale & Co. v. Pauly, 155 Wis. 541, 145 N. W. 372 (1914) where the court said, "We must view the acts of the parties from a common sense standpoint, presuming that they intended to deal with each other honestly, in the moral as well as the legal aspects of the matter, and that when they made the oral agreement, they did not intend . . . to engage in a transaction where either party could take an unconscionable, inequitable advantage of the other. . . ."

Other indications that the Mississippi Supreme Court has examined "the center of gravity" of those transactions which have been presented for adjudication are to be found in many of the Mississippi cases. Thus, where the contract is both made and to be performed in the same State, the court has, of course, applied the law of that State.[64] Again, where notes were executed in Mississippi, payable in Louisiana, but secured by a mortage on Mississippi land given in consideration of Mississippi bank credits, the court applied the law of Mississippi.[65] But, it must be recognized that where the only transactional contact points are the different places of making and performance, it is apparent that our court regards the place of performance as the more important. Thus, in cases of this nature, the court has spoken of the parties "localizing" or "domiciling"[66] the contract in the state where it was to be performed.

An unusual, but common sense, technique that is used by the court is to examine the problem presented in the light of the entire transaction, and not merely as regards the particular contract involved. Under this technique, if the court discovers that the particular contract is a part of a larger transaction, then the court will apply the contracts law of that state with which the larger transaction is most closely connected. Thus, in an action on notes dated and made payable in Louisiana, which had been given in consideration of the execution in Mississippi of a lease on property in this State, the court applied the law of Mississippi on the ground that the lease was "the main contract," and "the consideration for the notes."[67] Again, the court applied the law of Mississippi to contracts which were made in Mississippi, but payable in Louisiana, secured by a mortgage on lands in this State which contained a stipulation calling for the performance of certain acts in this State by the maker, because, "The larger part of the contract, in fact all of it except the mere place of payment of the money, was to be performed in this State and not in Louisiana."[68]

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[64]Sweet v. Dodge, 4 Sm. & M. 667 (Miss. 1845); Ivey v. Lalland, 42 Miss. 444 (1869); Partee v. Silliman, 44 Miss. 272 (1870); Bank of Louisiana v. Williams, 46 Miss. 625 (1872); Allen & Co. v. Bratton, 47 Miss. 119 (1872); McKee v. Jones, 67 Miss. 405, 7 So. 348 (1890); Woodsen v. Ownes, 12 So. 207 (Miss. 1892); Armistead v. Blythe, 20 So. 298 (Miss. 1896); Kendrick v. Kyle, 78 Miss. 278, 28 So. 951 (1900); Strouse v. Lanctot, 27 So. 606 (Miss. 1900); Aetna Insurance Co. v. Mount, 90 Miss. 642, 44 So. 162 (1907); Hooker v. McRae, 131 Miss. 899, 95 So. 744 (1923); Security Finance Co. v. Sharpe, 152 Miss. 286, 119 So. 829 (1928); Inter-State Life & Accident Ins. Co. v. Pannell, 169 Miss. 50, 152 So. 635 (1933); Castleman v. Canal Bank and Trust Co., 171 Miss. 291, 156 So. 648 (1934); Moody & Co. v. Boyle Gin Co., 180 Miss. 523, 177 So. 654 (1937). Beale [§ 332.32] is of the opinion that the cases of *Woodsen v. Ownes* and *Hooker v. McRae, supra,* are to the point that the court applied the law of the place of making. It is to be noted, however, that in both cases the contract was to be performed in the State where made.

[65]Brown v. Nevitt, 27 Miss. 801 (1854).

[66]The terms "located" and "domiciled" were interchangeably used in Harrison v. Pike, 48 Miss. 46 (1873); and the term "located" was used in Bank of Louisiana v. Williams, 46 Miss. 625 (1872); and Greenlee v. Hardin, 157 Miss. 229, 127 So. 777, 71 A. L. R. 741 (1930).

[67]Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 131 So. 350 (1900).

[68]Levy v. Jeffords, 141 Miss. 818, 105 So. 1 (1925). *Accord:* see note 35 *supra.*

*Performance*

Apparently, the brief period from 1843 through 1879 marked the beginning and the end of the presentation to the court of cases involving the problem of performance. Other than the five cases which were decided during this brief interval of time, no Mississippi cases on this problem have been found.

The law of Mississippi on this particular topic is lacking, not only in quantity, but in diversity as well. This is due to the fact that only two problems appear to have been adjudicated in this State, and a statement of two of the cases is a statement of all.

Thus, in an action upon a bill of exchange, drawn in Mississippi, and payable in Louisiana, the question arose as to whether or not the law of the place of performance should furnish the rule for the manner of making demand and protest.[69] The court held that it should, saying that, "There is no doubt that the laws of the place, where the bill or note is payable, must furnish the rule for the manner of making demand and protest."[70]

Again, in 1879, in an action by the beneficiary upon a life insurance policy expressly performable in Alabama, the question arose as to the identity of the contracts law to be applied to regulate the rate of interest allowed as damages for non-performance thereof.[71] The court applied the law of the place of performance on the ground that, "The policy being payable in the city of Mobile, 8% interest was properly awarded upon it according to the law of Alabama."

There seems to be no reason to suspect that the Mississippi Supreme Court will do otherwise than to follow the rules which have already been established in the other States. According to the most eminent text writers in the field of Conflict of Laws,[72] matters connected with the performance of a contract, such as the manner, place, time and sufficiency of performance, are to be governed by the law of the place where the contract is to be performed. Thus, if problems of the nature of the following arise, it is to be presumed that the Mississippi court will apply the contracts law of the place of performance: (a) the meaning to be given to the word "satisfactory" in a contract to deliver a "satisfactory" machine;[73] (b) the proper medium of payment;[74] (c) the time for payment when the due date falls on a Sunday;[75] (d) whether or not days of grace are to be allowed, and, if so, how long the period of

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[69]Chew v. Read, 11 Sm. & M. 182 (Miss. 1848).

[70]*Accord:* Ellis' Adm'r. v. Commercial Bank of Natchez, 7 How. 294, 40 Am. Dec. 63 (Miss. 1843); Frazier v. Warfield, 9 Sm. & M. 220 (Miss. 1848).

[71]The Granger's Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446 (1879); *Accord:* Chambliss & Williams v. Robertson, 23 Miss. 302 (1852).

[72]STUMBERG, p. 237; GOODRICH, p. 293; BEALE, § 355.1 *et seq.*

[73]Inman Mfg. Co. v. American Cereal Co., 133 Iowa 71, 110 N. W. 287, 8 L. R. A. (N.S.) 1140, 12 Ann. Cas. 387 (1907).

[74]Deutsche Bank v. Humphrey, 272 U. S. 517, 47 Sup. Ct. 166, 71 L. ed. 383 (1926).

[75]Stebbins v. Leowolf, 3 Cush. 137 (Mass. 1849).

[76]Skelton v. Dustin, 92 Ill. 49 (1897); Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227 (1890).

grace is to be;[76] and (e) whether payments are to be applied to a junior or senior debt.[77]

*Summary*

It appears that Mississippi will, as a rule of law, apply the contracts law of the place of performance to problems of performance.

With respect to problems of obligation,[78] it has been pointed out that a number of Mississippi cases contain certain verbiage by which the court refers to the "intention" of the parties to subject their contract to the contracts law of some one particular state, or to an attempt of the parties to make their contract "with a view of evading our laws upon the subject." It is submitted, however, that the "intention" considered most significant by the court is that intention of the parties to contract for performance in a particular state. This point is aptly illustrated by those cases where the court has refused to implement an attempt of the parties to "evade" the law of Mississippi. A vivid example of this is the *Shannon* case in which, it will be remembered, the parties expressly stated that their contract was to be performed in Georgia. This expressed intention must have been directed toward the *law* of Georgia because of the fact that the actual intention of the parties was to perform the contract in Mississippi. The court gave weight to the fact that actual performance was to be rendered in Mississippi, and applied the law of that State, refusing to give effect to the expressed intention. It is submitted that this is not a refusal to implement an intention to "evade" but merely recognizes that the parties have not succeeded in invoking the application of the law that they desired.[79]

It thus appears that the technique of the Mississippi Supreme Court is to examine the contacts between the transaction and various states. If the immediate contract is a part of a larger transaction, the court will then direct its attention to an examination of the contacts of the larger transaction with various states. In both situations, it reaches a conclusion as to the state in which a majority of the contact points, or

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[77]The Queen v. Ogilvie, 6 Can. Ex. 21 (1897).

[78]As has been remarked before, it may be doubtful whether the Mississippi Supreme Court will use the same technique in determining a question of form as is used when determining the identity of the contracts law to be applied to the other elements of obligation. Thus, it may be that the formal validity of a contract will be upheld if such contract complies with the formal requisites either of the law of the place of making, or of the law governing obligation; or it may be that as to form, the contract must comply with the law of the place of making.

[79]It is true that the Mississippi Supreme Court spoke of an attempt of the parties to "evade" the laws of Mississippi in Hinds v. Brazealle, 2 How. 837 (Miss. 1838); Brown v. Nevitt, 27 Miss. 801 (1854); American Freehold Land & Mortgage Co. v. Jefferson, 69 Miss. 770, 12 So. 464 (1892); Shannon v. Georgia State Bldg. & Loan Ass'n., 78 Miss. 955, 30 So. 51 (1901). See, however, Bullen v. Wisconsin, 240 U. S. 625, 630, 36 Sup. Ct. 473, 474, 60 L. ed. 830, 835 (1916) where Mr. Justice Holmes says, "We do not speak of evasion, because, when the law draws a line, a case is on one side or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

the most important contact points, are located. The law of this state is then applied, since it is that with which the court believes the contract is most closely connected. It is to be noted that the place of performance is considered by the Mississippi Supreme Court as an extremely important contact point—perhaps more important than any other, except the location of the land, if any, which is security for the contract.[80]

*David E. Crawley, Jr.*

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## The Mississippi Statute of Frauds in the Conflict of Laws

A plaintiff, upon securing proper process upon a defendant in Mississippi, may bring an action in this state on any contract; and often the elements of the contract may be so associated with a foreign jurisdiction that the Mississippi Court will apply, under the rules of the Conflict of Laws, the law of the foreign jurisdiction in determining the rights of the parties.[1] Conceding that the law of the foreign jurisdiction is applicable, will the Mississippi Court look to the Mississippi statute of frauds,[2] or will the statute of frauds of the foreign jurisdiction control?[3] That question can best be answered by determining whether the Mississippi Court[4] regards the Mississippi statute of frauds as substantive or as procedural rules of law.[5]

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[80]This is stated with caution because there are few cases where the sole contract points considered by the court were place of making, place of performance, and the location of the land. In Levy v. Jeffords, 141 Miss. 818, 105 So. 1 (1925) the contract was made in Mississippi, to be performed in Louisiana, and the land, which was the security given therefor, was in Mississippi. The court applied the law of Mississippi. *Accord:* National Mutual Bldg. & Loan Ass'n. of N. Y. v. Brahan, 80 Miss. 407, 31 So. 840 (1902); Adler v. Interstate Trust & Banking Co., 166 Miss. 215, 146 So. 107, 87 A. L. R. 347 (1932). But compare, however, Commercial Bank v. Auze, 74 Miss. 609, 21 So. 754 (1897) where the court applied the law of Mississippi to a contract made and to be performed there, but secured by land in Louisiana. *Accord:* Kendrick v. Kyle, 78 Miss. 278, 28 So 951 (1900); Dodds v. Pyramid Securities Co., 165 Miss. 269, 147 So. 328 (1933). It is to be noted also that in Shannon v. Georgia State Bldg. & Loan Ass'n., 78 Miss. 955, 30 So. 51 (1901), the court spoke of the location of the land "where alone the mortgage could have been enforced." *Accord:* Levy v. Jeffords, 141 Miss. 818, 105 So. 1 (1925).

See also Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 131 So. 350 (1930) in which the court considered determinative the location of the land with respect to which the main part of the contract was made.

[1]*See* Goodrich, Conflict of Laws (2d ed. 1938) §§ 103, 258. When the Mississippi law or the law of a foreign jurisdiction should apply in determining substantive rights as to questions of form under the contract is a question of Conflict of Laws which will be discussed in a latter part of this article.

For a full discussion of what substantive law shall be applied as to contracts in Mississippi under Conflict of Laws, *see* Note, *Conflict of Laws in Mississippi as to Contracts* p. 240 *supra.*

[2]The Mississippi statutes which come within the scope of this discussion are: Miss. Code Ann. (1930) §§ 3343, 3347, 3348, 3349.

[3]*See* Fox v. Matthews, 33 Miss. 433 (1856); Hooker v. McRae, 131 Miss. 899, 95 So. 744 (1923), *sugg. err. overr.*, 138 Miss. 439, 103 So. 197 (1925); *see also* Craft v. Lott, 87 Miss. 590, 40 So. 426 (1905).

[4]Restatement, Conflict of Laws (1934) § 584.

[5]". . . from the point of view of Conflict of Laws, procedural rules are those which concern methods of presenting to a court the operative facts upon which

It is well settled in Conflict of Laws that whatever substantive law may govern, the cause must always meet and conform to the procedural requirements of the forum, the court where the cause of action is brought and tried.[6] Thus, if the statute lays down a procedural rule, every cause of action appearing in the forum must conform to its requirements. But if the statute is substantive, it will govern only those actions in the forum subject to the substantive laws of the forum. Therefore, if the action is subject to the substantive law of a state other than that of the forum, the statute of frauds of that state would seem to apply; that is, the statute of frauds of that state would apply if it were substantive and not procedural in its nature. And it would seem that if the statute of the foreign jurisdiction were a procedural rule and the statute of the forum were substantive in its nature, then neither would apply, and the contract would be governed, as regards the statute of frauds, by the common law.[7]

The leading British case is *Leroux v. Brown*[8] in which suit was brought in an English court on an oral contract made in France and governed by French law. The contract, which was within the fourth section of the British statute, would have been enforceable in the French courts. Recovery in the English court was denied on ground that the British statute of frauds was procedural and would thus be applied by the forum. In a dictum the court drew a distinction between the wording of the fourth section of the British statute, "No action shall be brought," and that of the seventeenth section, "No contract shall be allowed to be good." Because of different phraseology, the first was held to be procedural, and the second was regarded as stating a substantive rule. The distinction was continued for forty-one years, until the language of the seventeenth section was changed under the "Sale of Goods Act"[9] to read, ". . . shall not be enforceable by action." The *Leroux* case has never been overruled, and the law of England today regards all sections of the British statute of frauds to be procedural.

It is in the views of American jurisdictions that a conflict in authorities appears.[10] Some of the courts have followed the British view as set

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legal relations depend; substantive rules, those which concern the legal effect of those facts after they have been established." STUMBERG, CONFLICT OF LAWS (1937) 128.

However, it should be noted that the line between things substantive and things procedural is not easily drawn. Certain rules, such as those concerning the admission of evidence, might be termed procedural, but they might, at the same time, have a very direct effect upon the substantive rights of the parties. There is no magic in the terms which will help to determine the dividing line. Rather the terms themselves serve more as labels for things substantive and procedural after the courts of the forum have under general considerations determined their nature to be such.

[6]RESTATEMENT, CONFLICT OF LAWS (1934) § 585.

[7]For a criticism of the reasoning that a logical escape cannot be found so long as jurisdictions are regarded, one, as declaring the statutes to be substantive, and another declaring them to be procedural, *see* Walter Wheeler Cook, *Characterizations in the Conflict of Laws* (1941) 51 YALE L. J. 191.

[8]12 C. B. 801, 138 Eng. Rep. 1119 (C. P. 1852).

[9]Sale of Goods Act, 1893, § 4, 56 & 57 VICT. C. 74.

[10]For a full discussion of the different and conflicting views of the courts as to whether the statute of frauds is substantive or procedural, *see* Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311; Taintor, *"Universality" in the Conflict of Laws of Contracts* (1939) 1 LA. L. REV. 695, 713; 2 BEALE,

out in *Leroux v. Brown*.[11] These courts have adopted the distinction there drawn between the fourth and seventeenth sections of the statute. The distinction remains of importance in many jurisdictions of this country, for in many states the same difference in phraseology exists between the modern counterparts of the fourth and seventeenth sections of the British statute that was present in the statutes at the time the *Leroux* case was before the court.[12]

On the other hand, some American courts have followed the British rule in calling the statute procedural, but have refused to recognize the distinction between the fourth and seventeenth sections.[13] Other jurisdictions have declared the statute of frauds to be substantive in its nature, and have consistently followed this holding.[14]

A small minority of the states which hold the statute substantive seem also to have declared the statute representative of a public policy to protect its citizens and those before its courts, since there is the possibility that certain causes of action may be fraudulently maintained through perjured oral testimony. These jurisdictions have then, as a matter of public policy, declared that, since the rule of the statute be substantive, all contracts before the forum, even those which under the rules of conflict of laws are governed by the substantive law of another jurisdiction, must conform with the requirements of the statute of frauds of the forum.[15]

No attempt will be made to indicate which of the above views correctly describes the nature of the statute of frauds. However, many American conflicts scholars declare that the statutes are correctly described as substantive rather that procedural.[16] But as long as some

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CONFLICT OF LAWS (1935) § 334.1; GOODRICH, CONFLICT OF LAWS (2d ed. 1938) §§ 85, 205; STUMBERG, CONFLICT OF LAWS (1937) 137. For a case which considers in detail the different possibilities of construction, *see* Lams v. Smith Co., 36 Del. 477, 178 Atl. 651 (1935).

See the following cases in which a Pennsylvania statute was characterized as procedural by one court and as substantive by others. Franklin Sugar Ref. Co. v. Holstein's Inc., 275 Fed. 622 (D. C. Del. 1921); Franklin Sugar Ref. Co. v. Martin-Nelly Grocery, 94 W. Va. 504, 119 S. E. 473 (1923); Straesser-Arnold Co. v. Franklin Sugar Ref. Co., 8 F. (2d) 601 (C. C. A. 7th, 1925).

[11]12 C. B. 801, 138 Eng. Rep. 1119 (C. P. 1852).

[12]Franklin Sugar Ref. Co. v. Holstein Harvey & Sons, 275 Fed. 622 (D. C. Del. 1921); Third Nat. Bank v. Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119 (1902); Houghtaling v. Ball & Chapin, 19 Mo. 84, 59 Am. Dec. 331 (1885); Hunt v. Jones, 12 R. I. 265, 34 Am. Rep. 635 (1879). See also the authorities cited note 10 *supra*.

[13]Straesser-Arnold Co. v. Franklin Sugar Ref. Co., 8 F. (2d) 601 (C. C. A. 7th, 1925); Townsend v. Hargreaves, 118 Mass. 325 (1875); Heaton v. Eldridge, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817 (1897). See also the authorities cited note 10 *supra*.

[14]Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111 (1893); Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082 (1917). See also the authorities cited note 10 *supra*.

[15]Barbour v. Campbell, 101 Kan. 616, 168 Pac. 879 (1917) is the only case squarely in point.

[16]GOODRICH, CONFLICT OF LAWS (2d ed. 1938) § 85; STUMBERG, CONFLICT OF LAWS (1937) 139; Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311; RESTATEMENT, CONFLICT OF LAWS (1934) § 334.

courts regard certain statutes as procedural and others regard similar statutes as substantive, if a jurisdiction should so desire, it can protect its citizens under a statute of frauds in its own as well as in other jurisdictions only by following the "public policy" view of the Kansas court.[17]

The Mississippi Code of 1930 contains four statutes relating to frauds which are within the scope of this article.[18] It should be noted that the phraseology of the statutes is such that under the English view, following the distinction set out in *Leroux v. Brown*,[19] Section 3343 would be procedural,[20] while Sections 3347, 3348, and 3349 would be substantive.[21] However, unless the British view is followed, the nature of the statutes as substantive or procedural may be considered as a single problem.

In *Hooker v. McRae*[22] a contract was made in Tennessee for the purchase of railroad tires from the plaintiff. Defendant, when sued upon the contract, plead the statute of frauds. Justice Ethridge declared that the law of Tennessee was applicable and that the contract was not within the Tennessee statute.[23] There is no direct reference to the Mississippi statute declaring it to be substantive, but obviously the holding of the case must indicate that the statute was not procedural for the contract was within the Mississippi statute.[24] Also the case would indicate, though it was not so expressly stated, that the Tennessee statute was substantive rather than procedural. This is interesting because the Tennessee statute's phraseology is identical with that of the similar British statute under the "Sale of Goods Act" which is regarded as procedural in England.[25]

In *Fox v. Matthews*,[26] where there was an oral agreement of compromise reached at Vicksburg concerning certain slaves in Louisiana, the Louisiana statute of frauds was applied by the Mississippi Court. Thus it would seem that the court regarded the Louisiana statute as substantive.[27] There would appear no Mississippi statute of frauds applicable

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[17]Barbour v. Campbell, 101 Kan. 616, 168 Pac. 879 (1917).

[18]Miss. Code Ann. (1930) §§ 3343, 3347, 3348, 3349.

[19]12 C. B. 801, 138 Eng. Rep. 1119 (C. P. 1852).

[20]The wording: ". . . action shall not be brought whereby to charge. . . ." is exactly the same as the phraseology of the British statute declared procedural in the *Leroux* case.

[21]The wording of Section 3347: ". . . shall not be allowed to be good and valid. . . ." is exactly the same as the phraseology of the British statute declared by the dictum of the *Leroux* case to be substantive. Also, the wording of Sections 3348 and 3349: ". . . shall be utterly void. . . ." would seem similar to the phraseology of that section declared substantive rather than that held to be procedural.

[22]131 Miss. 899, 95 So. 744 (1923), *sugg. err. overr.*, 138 Miss. 439, 103 So. 197 (1925).

[23]Tenn. Laws 1919, c. 118, § 4, which declares that no contract for the sale of goods of over $500.00 in value ". . . shall . . . be enforceable by action. . . ." unless evidenced by writing.

[24]Miss. Code Ann. (Hem. 1917) § 3123 provides that no contract for sale of personalty for a price of $50.00 or over ". . . shall . . . be allowed to be good. . . ." unless evidenced by writing.

[25]See the authorities cited note 10 *supra* and their discussion of the *Leroux* case.

[26]33 Miss. 433 (1857).

[27]Article 461, 2415 of the Civil Code of Louisiana declared slaves to be immovable property, sales of which if not in writing should be "null." However, Article 2255 stated that such sale must be in writing, "but if verbal sale, or other dis-

to a contract for the sale of personalty[28] under the Mississippi Code of 1840.[29] If the Louisiana statute had not been regarded as substantive and controlling, the common law would have been applied in determining the rights under the agreement.

A *dictum* by Justice Truly in *Craft v. Lott*[30] seems to indicate that had the law of Alabama applied instead of the law of Mississippi, the Mississippi statute of frauds would not have been construed as procedural to defeat recovery under oral contract. Note that the phraseology of the applicable Mississippi statute would be labeled procedural in jurisdictions adopting the British view and the distinction of the *Leroux* case therein contained.[31]

From these cases it would seem, then, that Mississippi regards the statute of frauds as a rule of substantive law. The rule followed by some American courts that all such statutes are procedural would definitely seem repudiated. The British view as set out in the *Leroux* case was not applied in a single instance, though the court had at least two opportunities in the three cases considered. Finally, the court never entertained the view that, though the statute be substantive, as a matter of public policy all cases before the forum would be required to conform. However, before examining the three Mississippi cases which shed feeble light upon the Court's view of the statute of frauds as substance or procedure, it is well to note that in none of these cases was the specific problem stated to the court by counsel nor considered by the court of its own accord. Rather, the court simply declared which state's law should govern as regarded questions under the statute of frauds. Perhaps inferences drawn from these opinions will not be followed by the court when the question of the statute as substantive or procedural is squarely and clearly before the justices.

In the foregoing discussion, before the consideration of the Mississippi cases, it was assumed that under the Conflict of Laws rule, the law of a foreign state would apply to substantive matters before the court.[32] Now, if the Mississippi statute of frauds is regarded as substantive, following the apparent trend of the court, the Mississippi statute would never apply in the assumed cases. The foreign statute would apply if it were substantive; if it were procedural, the common law would govern.[33]

Briefly, then, let us consider what rule of conflict of laws will be looked to in determining when, in actions brought in this state, a foreign statute of frauds shall be applied instead of Mississippi's "substantive" statute.

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position of such property be made, it shall be good against the vendor, as well as against the vendee, who confess it, when interrogated on oath, provided actual delivery has been made. . . ."

[28]MISS. CODE (1840) c. 11, § 29 declares slaves to be personalty.

[29]The Mississippi Code of 1840 does not have a statute of frauds directed toward contracts for the sale of personal property.

[30]87 Miss. 590 (1905).

[31]The provision here considered was MISS. CODE ANN. (1892) § 4225 which provided: ". . . an action shall not be brought whereby to charge. . . ." which is the same phraseology as the English statute declared in the *Leroux* case to be procedural.

[32]The body of the text at which note 2, *supra,* is cited.

[33]Note 7 *supra.*

Generally the Mississippi view of what law shall be applied to contracts as a question of Conflict of Laws[34] is that there shall be applied that law of whichever jurisdiction was intended by the parties, there being a presumption in favor of the law of the place of performance. Thus, if a contract was made in Mississippi to be performed in Louisiana, the presumption would be that Louisiana law would govern, unless an intent otherwise by the parties could be shown.[35] However, as a practical matter, the intention of the parties would seem to be measured by the court from the accumulation of contact points; in other words, the intention of the parties is generally determined to be directed toward that jurisdiction in which the greater number of operative facts concerning the contract took place or were to take place. As generally applied by the court, then, it will be seen that the intention test is not a test of "subjective design."[36]

Now, under the rule as above set out, the Mississippi statute of frauds, being a substantive rule, would apply to all contracts sued upon in a Mississippi forum which were not "intended" by the parties to be governed by the laws of another state. But some courts seem to apply a different rule in determining what law shall govern the question of whether the form of a contract is that required by the statute of frauds.[37] These courts would always govern form by the law of the place where the contract was made, while the other questions under the contract, such as validity, are determined by whatever general test the court applies to contracts under Conflict of Laws—the "intention" of the parties as in Mississippi, or the place of making or of performance as in various other jurisdictions.[38]

A first glance at the Mississippi cases might seem to indicate a particular rule that the requirements of form are governed entirely by the law of the place of making. Thus, Justice Ethridge in *Hooker v. McRae*,[39] after stating that the contract was made in Tennessee, said that the Tennessee statute of frauds was controlling. But further inquiry, especially as to the opinion of the court on the suggestion of error, would seem to indicate that the contract was also to be performed in Tennessee. The *dictum* of Justice Truly in *Craft v. Lott*[40] looks merely to the place of making in determining what statute of frauds should apply. But note that in *Fox v. Matthews*[41] the contract was made in Mississippi, but the Louisiana statute of frauds governed.

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[34]See Note, *Conflict of Laws in Mississippi as to Contracts*, p. 240 *supra*.

[35]See Greenlee v. Hardin, 157 Miss. 229, 127 So. 777 (1930) and its discussion in Note (1942) MISSISSIPPI LAW JOURNAL pp. 240, 243 *supra*.

[36]Note the development of the "contact point" theory in Note (1942) MISSISSIPPI LAW JOURNAL p. 240 *supra*.

[37]GOODRICH, CONFLICT OF LAWS (2d ed. 1938) § 106; STUMBERG, CONFLICT OF LAWS (1937) 217. But note that Stumberg is not so sure of the peculiar rule regarding form as is Goodrich.

[38]*See* GOODRICH, CONFLICT OF LAWS (2d ed. 1938) §§ 103-111; and STUMBERG, CONFLICT OF LAWS (1937) 212-219.

[39]131 Miss. 899, 95 So. 744 (1923), *sugg. err. overr.*, 138 Miss. 439, 103 So. 197 (1925).

[40]87 Miss. 590 (1905).

[41]33 Miss. 433 (1843).

However, these Mississippi cases present no more than a vague hint as to what the law may be. Perhaps the Mississippi Court will do well to mark what Stumberg said in this connection:

> "It is frequently said that the law of the place of making governs as to matters of form. But in the American cases the question of formal validity of contracts has usually involved primarily a controversy as to whether the particular rule, such as the parol evidence rule or the Statute of Frauds, related to procedure or to substance, with very little consideration in the cases, where the question is admittedly one of substance, of whether the law of the place of contracting or some other law should control."[42]

Finally, there is a widely recognized exception to any general rule of Conflict of Laws that a jurisdiction may adopt as to matters of form in contract. The subject matter of the exception is restricted to contracts involving the transfer of interests in real property. Generally such contracts are said to be governed by the statute of frauds of that jurisdiction in which the property is located.[43]

*Walter R. Bridgforth*

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## Tort Liability to Trespassers in Mississippi

That the common law changes to meet the requirements of social conditions is well illustrated by the growth of the law governing tort liability to trespassers. At one time in feudal England, no one thought of protecting the trespasser; all the rights were on the side of the landlord. Indeed, the general rule was that the landowner was not liable to infant or adult trespassers for any harm which they may receive while upon his land. But centuries ago, the rule was modified to allow trespassers to recover for willful or wanton injury suffered while on the land of another. And today, that rule is still with us. Surely, we recognize the many social changes which have taken place in our society, but for some reason the courts have hesitated to depart from the expression of the old rule. However, in allowing recovery, the rule has been patterned to fit our modern needs. Liberal interpretations have allowed courts to hold for the trespasser to recover while obeisance is paid to the rule. Furthermore, various methods have been developed by the courts to circumvent the harshness of the rule until we find cause to doubt whether or not the statement that the landowner is bound only to refrain from willfully or wantonly injuring the trespasser actually represents the law today.

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[42] Stumberg, Conflict of Laws (1937) 217.

[43] Goodrich, Conflict of Laws (2d ed. 1938) §§ 106, 272. "Questions regarding formal validity of agreements affecting land and interests therein require a brief comment. It is the general rule that the creation of an interest in land is governed by the *lex rei sitae*. This naturally includes the form of the instrument by which the interest is alleged to be created; it must conform to the law of the situs."

This exception is generally recognized but Beale does not recognize it as such. He treats the cases relating to real estate as he does all others, saying that some follow the peculiar rule of looking to the situs of the property. *See* Beale, Conflict of Laws (1935) § 334.1, p. 1183 at note 7.

In setting forth the duty which the landowner owes to the trespasser, the Mississippi Supreme Court has usually announced the well established rules. The familiar doctrine that a landowner owes the trespasser no duty except to refrain from willful or wanton injury has been repeatedly announced in the decisions.[1] But in actually applying the rule to the cases which have come before it, the court has found ways of avoiding the harshness of a literal application of the rule. It is these devices for avoiding the application of the rule that we must now consider.

The first and easiest way is to declare the rule inappropriate because the plaintiff is not a trespasser but a licensee. The distinction between a trespasser and a licensee, as set forth by the *Restatement,* is that "a trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise,"[2] while a licensee is a "person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission."[3] The dividing line between a trespasser and licensee often seems very vague. Of course, it is easy to say that the difference is the possessor's consent to the entry, but the word "consent" provides considerable leeway for the court in making its decisions.

In the case of *Lepnick v. Gaddis,*[4] the landowner pleaded that there was no liability on his part because the plaintiff was a trespasser. How-

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[1]In Louisville N. O. & T. Ry. v. Williams, 69 Miss. 631, 639, 12 So. 957 (1892), the plaintiff trespasser was seeking recovery for injuries. The court said: "Being a trespasser, the engineer's duty to her was measured and covered by his abstention from willful or wanton negligence."

"The road took no passengers; it invited none; it owed to the public no duty, because it was not serving it. The only possible duty it assumed to Harvey was that it do him no willful wrong. . . . When Harvey took passage on this train as he did, he is bound with a knowledge of the character of the road he was taking passage on and assumed the risk. . . . Nothing in the record indicates that the operatives on this train handled it with gross negligence as to indicate willfulness or wantonness."

Ingram-Day Lumber Co. v. Harvey, 98 Miss. 11, 18, 53 So. 347, 348 (1910). "By a long line of decisions this court has held to the doctrine that the railroad owes no duty to a trespasser until his peril is discovered; that, as to trespasser, it is not the duty to keep a look-out. If there is any principle of law settled by this court, it is that principle. As a corollary to this well settled rule is the further rule that the railroad company must not wantonly or willfully injure a trespasser upon its tracks. These two rules are reasonable and just and are not applicable to railroads alone, but measure the liability of everybody similarly situated." New Orleans, M. & C. R. R. v. Harrison, 105 Miss. 18, 20, 61 So. 655 (1913).

"Therefore, we have simply a case where the plaintiff, a trespasser, was injured by an unfortunate accident. It is a case where appellee owed appellant no duty except not to willfully or wantonly injure him." Salter v. Deweese-Gammill Lumber Co., 137 Miss. 229, 240, 102 So. 268, 270 (1924).

"In this case, the servant and the master owed the little negro boy the duty not to willfully and wantonly injure him. . . ." Trico Coffee Co., Inc. v. Clemens, 168 Miss. 748, 755, 151 So. 175, 176 (1933).

[2]RESTATEMENT, TORTS (1934) § 329.

[3]*Id.* at § 330.

[4]72 Miss. 200, 207, 16 So. 213, 215, 26 L. R. A. 686, 692 (1894). ". . . the phrase, 'implied invitation,' in its real value and significance, as derived from its application in the adjudged cases, imparts knowledge by the defendant of the probable use by the plantiff of the defendant's property so situated and conditioned as to be open to, and likely to be subjected to, such use."

ever, the court found that the plaintiff was not a trespasser since the defendant permitted the public to walk across his land. Here, mere failure on the part of the landowner to stop the public from crossing his land was equivalent to his giving his consent for the entry. It was that consent which took the plaintiff out of the class of trespassers. In the later case of *Allen v. Yazoo & M. V. R. R.*,[5] there was also an "implied invitation." The court held that the company had induced the plaintiff to enter its premises by providing an easy and convenient pathway apparently intended for public use. Again, the "possessor's consent" which took the plaintiff out of the trespasser class was a close question and was here decided by the jury. This formula of the "implied invitation" is very flexible and easily adaptable to the case in which the court wishes to use it.[6]

A second method of allowing recovery in spite of the general rule is by what has developed as an "admitted exception to the rule that a landowner owes no duty to a trespasser until his presence is known to the owner."[7] The following statement is found in the *Restatement of Torts:*[8]

> "A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety."

This exception is similar to the "implied license" which has already been pointed out as a method of allowing the trespasser to recover. But here the court seems unwilling to go quite that far. Where his land is constantly travelled by trespassers, the court may impose a greater duty on the landlord without holding that he gave the intruder an implied license to enter.

No man is bound to make his land intruder-proof. But if the landowner, as a reasonable man, knows that his land is frequented by trespassers, he may be liable for injuries sustained by the intruders even though their presence was not known. The court uses this method to allow recovery in *Gulf & S. I. R. R. v. Bond:*[9]

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[5]111 Miss. 267, 277, 71 So. 386, 388 (1916). "The jury were warranted in finding that the situation, created by the defendant, was such that would import 'knowledge by the defendant of the probable use by the plaintiff of the defendant's property so situated and conditioned as to be open to, and likely to be subjected to, such use'."

[6]Eldredge, *Tort Liability to Trespassers* (1938) 12 TEMP. L. Q. 32, 35: "If an examination of a case discloses a situation where a reasonable man would not conclude that the possessor of the land had consented to the entry but the court nonetheless calls the entrant a licensee, and permits him to recover for harm caused by other than 'wilful or wanton conduct,' the conclusion is inescapable that the court is, in reality, enlarging the liability to trespassers but disguising the change in the law by calling the plaintiff what he is not."

[7]Carlton, *Mississippi Rules on the Liability of Railroads to Trespassers on Their Tracks* (1938) 10 MISSISSIPPI LAW JOURNAL 305, 310.

[8]RESTATEMENT, TORTS (1934) § 334.

[9]181 Miss. 254, 373, 179 So. 355, 360 (1938).

> "The court instructed for the plaintiff that if the jury believed from the preponderance of the evidence . . . that at the time he was struck by the train the said Carson Bond was standing, sitting, or walking on the main line of the defendant, at a place where the employees of the train could and did see him, or should have seen him if keeping a proper outlook on entering a much frequented place used by the general public, without blowing the danger signal, or making any effort to avoid striking him, then they would find a verdict for the plaintiff."

Another group coming outside the general rules governing tort liability to trespassers are those referred to as "known trespassers." Ordinarily, there is no duty to anticipate the presence of trespassers on the part of the landowner. But, the landowner who discovers the trespassers is no longer entitled to the protection of the general rule of no liability to trespassers. In the very early Mississippi case, *Jamison v. Illinois Central R. R.*,[10] the court held that, if the servant of the company saw the child trespasser and then failed to exercise due care to avoid the injury, the company was liable.

The duty to a trespasser, when his presence is discovered is that of reasonable care to prevent an injury, according to a majority of the cases.[11] *Christian v. Illinois Central R. R.* holds:[12]

> ". . . servant of a railroad company are not bound to keep a lookout for trespassers, but, if they see one, and realize his danger, and that he can not, by the exercise of reasonable effort, extricate himself, they must exercise reasonable care to prevent injury to him."

When reasonable care is used to protect the trespasser, there is no liability.[13] The court has, at times, however, stated the duty to a trespasser, even after he has been discovered, to be only to refrain from willful or wanton injury.[14] But the interpretation of this rule has been so liberal that the liability imposed has been about the same regardless

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[10]63 Miss. 33 (1885).

[11]Jamison v. Illinois Cent. R. R., 63 Miss. 33 (1885); New Orleans & N. E. R. R., 66 Miss. 3, 5 So. 629 (1889); Louisiana, N. O. & T. Ry., 68 Miss. 368, 8 So. 747 (1891); Mobile & O. R. R. v. Watly, 69 Miss. 145, 13 So. 825 (1891); Christian v. Illinois Cent. R. R., 71 Miss. 237, 15 So. 71 (1894); Southern Ry. v. Pittman, 97 Miss. 416, 52 So. 207 (1910); Alabama G. S. Ry. v. Daniel, 108 Miss. 358, 66 So. 730 (1914); Campbell v. Gulf M. & N. R. R., 126 Miss. 438, 89 So. 1 (1921); Mobile & O. R. R. v. Robinson, 132 Miss. 841, 65 So. 749 (1923); Illinois Cent. R. R. v. Mann, 132 Miss. 819, 102 So. 853 (1925); Yazoo & M. V. R. R. v. Lee, 148 Miss. 809, 114 So. 866 (1927); Young v. Columbus & G. R. R., 165 Miss. 287, 147 So. 342 (1933); Murray v. Louisville & N. R. R., 168 Miss. 513, 151 So. 913 (1934).

[12]71 Miss. 237, 240, 15 So. 71, 72 (1894).

[13]Louisville, N. O. & J. Ry. v. Williams, 69 Miss. 631, 12 So. 957 (1892); Louisville, N. O. & Texas Ry. v. Cooper, 68 Miss. 368, 8 So. 747 (1890); Yazoo & M. V. R. R. v. Huff, 111 Miss. 486, 71 So. 757 (1916).

[14]Mobile & O. R. R. v. Stroud, 64 Miss. 784, 2 So. 171 (1887); Mobile & O. R. R. v. Holliday, 79 Miss. 294, 30 So. 820 (1901); Kansas City, M. & B. R. R. v. Hawkins, 82 Miss. 209, 34 So. 247 (1919); Illinois Cent. R. R. v. Ash, 128 Miss. 410, 91 So. 31 (1922); Edward Hines Yellow Pine Trustees v. Holley, 142 Miss. 241, 106 So. 822 (1926).

of the language used by the court. While reference is made to the rule that liability exists only for willful or wanton injury, what constitutes "wanton" injury may vary greatly with the circumstances. In upholding the jury verdict in *New Orleans, M. & C. R. R. v. Harrison,*[15] the Supreme Court said:

> "From the evidence the jury must have thought that he did see, and in that case, the carelessness was 'so gross as to be tantamount to design'."

The actual decisions indicate that reasonable care under the circumstances must be used when the trespasser's presence is discovered. And here, we have the third method for allowing the trespasser to recover for injuries sustained on the land of another. The general rule that there is liability only for willful and wanton conduct no longer applies when the trespasser's presence is known, and the duty to use reasonable care is imposed on the landowner.

At an early date the Mississippi Supreme Court indicated a realization that the general rule by which the landowner was liable only for willful or wanton injury to the trespasser should not apply when the plaintiff was a child. In that class of cases the court readily imposed on the landlord a greater duty—to anticipate the presence of the child, under certain circumstances.

In 1887 in the case of *Mackey v. Vicksburg,*[16] the court was dealing with a six year old trespasser who was injured on an excavation dug by the city. The city was held to be liable to the child, since his presence could have been reasonably anticipated. A definite recognition was given to the theory that the courts should protect children against their childish curiosity when, in *Sprengler v. Williams,*[17] the court said:

> "All persons are supposed to know the curiosity of children, and their disposition to play around and about objects of unusual appearance. No court would permit a verdict to stand which rested upon the denial of such instincts in children. . . ."

Again, in clear language, the court held in *Mayor of Vicksburg v. McLain*[18] that the city could not escape liability on the ground that the child was a trespasser. However, the presence of the child trespasser must be reasonably anticipated.[19] And if that presence is reasonably antici-

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[15]105 Miss. 18, 21, 61 So. 655 (1913).

[16]64 Miss. 777, 2 So. 178 (1887).

[17]67 Miss. 1, 4, 6 So. 613, 614 (1889). The plaintiff's seven year old son was killed by the falling of a pile of lumber. It was alleged that the defendant negligently piled the lumber in a manner which attracted children to play thereon. Recovery allowed.

[18]67 Miss. 4, 12, 6 So. 774, 775 (1889). The child was killed when the top of a bluff, being graded by the city, fell on him. It was said: ". . . the child was not a trespasser in such a sense as to affect the right of the parent to recover, if it shall be made to appear that the death of the child is attributable to the negligence of appellant."

[19]Temple v. McComb City Electric Light & Power Co., 89 Miss. 1, 42 So. 874 (1907). The holding in this case allows recovery to the child trespasser, whose presence the defendant, as reasonable men, were bound to anticipate. Plaintiff was a

pated, the landowner must use due care under the circumstances to prevent injury to the child. The child is not held to the same degree of care as required of adults but must exercise only such care as it is capable of exercising, taking into consideration its age, experience, knowledge, and intelligence.[20] Still, after taking the above matters into consideration, the landowner must reasonably anticipate the child's injury if he is to be held liable.[21]

In recent years, the court has begun to speak in terms of the attractive nuisance doctrine in allowing recovery to children trespassers. But from the time that theory was recognized in 1921,[22] the court has followed certain limitations in its application. The court speaks in terms of that doctrine in *McComb City v. Hayman,*[23] but recovery is denied. The thing causing the injury to the child was not artificially created and there was no evidence as to why the child strayed from the street.

If due care is exercised, the attractive nuisance theory does not allow recovery.[24] But should the duty not be discharged, the landowner will be liable. In *Henry v. Mississippi Power & Light Co.*[25] a warning by the defendant's agent to the child, after the child had been admitted into the power transformer station enclosure, was insufficient care amounting to negligence, and should the jury find that the enclosure was an attractive nuisance to the child, the company would be liable.

*Bonhomie & H. S. Ry. v. Hinton*[26] points out another limitation on the application of the doctrine of attractive nuisance in Mississippi. The

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ten year old child. He was injured when he climbed into a tree and came into contact with an electric wire, negligently permitted to remain uninsulated by the defendant company.

[20]Potera v. City of Brookhaven, 95 Miss. 774, 49 So. 617 (1909). Plaintiff, a child ten or twelve years old, was injured when he came into contact with a wire conducting electricity to a lamp. The lamp, a street light belonging to the defendant, fell into the street where the child saw it and touched it.

[21]Thompson v. Illinois Central R. R., 105 Miss. 636, 63 So. 185 (1913). In this case, the plaintiff's nine year old son was drowned when he waded into a pond, created by the defendant company, covering eighty acres in the woods a half mile from the inhabited part of a nearby town. The court said: ". . . the company was not liable; the accident being one which could not be anticipated as probable by the exercise of reasonable forethought, nor prevented by reasonable precaution."

[22]McComb City v. Hayman, 124 Miss. 525, 87 So. 11 (1921).

[23]*Ibid.* The child was drowned when it left the street and fell into a nearby gully, the sides of which were covered with honeysuckle.

[24]Lucas v. Hammond, 150 Miss. 369, 282, 116 So. 536, 537 (1928). When a five year old trespassing child was injured by a revolving shaft in conveyor from cotton gin to seed house, after having been warned by an employee to stay away, the court held: ". . . landowner has right to maintain dangerous instrumentality attractive to children when exercising ordinary care to prevent injury. . . . The appellee's only duty to the appellant was to exercise ordinary care to prevent him from obtaining access to, and being injured by, the conveyor. This duty he discharged."

[25]166 Miss. 827, 146 So. 857 (1933). A thirteen year old child was admitted to a high power electric transformer station by the defendant's agent. He was killed when he touched an uninsulated wire, although he had been warned not to touch any of the equipment in the station.

[26]155 Miss. 173, 125 So. 271 (1929). The child, playing around a small depot of the defendant, began sliding the door back and forth in such a manner that it fell and injured him. Children were in the habit of playing around the house, which was used and maintained as a depot, having this heavy door which closed the freight compartment.

thing attracting the child must be something unusually attractive to children. The small depot and door therein in the case mentioned above were not of this nature and no recovery was allowed to the injured child. The court takes note in this case that the doctrine must not be broadened to include "any agency which is dangerous and attractive to children" for that would be "entirely too broad."[27]

The court again holds directly that the attractive nuisance doctrine does not apply in *Maxedon v. City of Corinth*,[28] where a child, while playing, fell off a sidewalk without banisters. The jury found that the proximate cause of the injury was the scuffle of the children and released the landowner from liability. Concerning the application of the doctrine, the court, in *Salter v. Deweese-Gammill Lumber Co.*,[29] said:

> "The doctrine applies only where the thing that caused the injury is an attractive and also an alluring nuisance. It must be deceiving to the child. It must be a bait which the child will follow 'as mechanically as a fish.' It must be certain to attract, and the danger must be hidden to the inexperienced child."

From the cases in which the court has discussed the attractive nuisance doctrine, we observe that Mississippi imposes certain limitations upon that theory. But if the plaintiff is able to bring his case within this doctrine, he is allowed to recover even though he is a trespasser. To the child trespasser, the duty on the part of the landowner has been expanded to that of reasonable care and reasonable anticipation of the child's presence. With this expansion, we find another escape from the general rule governing tort liability to trespassers.

What is the general rule governing liability to trespassers in Mississippi? We are told that the landowner owes the trespasser no duty—he is liable only for willful or wanton injury to the trespasser. But more important than that rule itself are the devices by which the courts escape its effect. The court has found the following methods to circumvent the harshness of the rule: the rule does not apply when the court decides to call the plaintiff a licensee instead of a trespasser, when the place where the trespasser was injured was one constantly travelled by trespassers and the court decides that the plaintiff's presence might have been reasonably anticipated, when the plaintiff was a known trespasser, and when the

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[27]Bonhomie & H. S. Ry. v. Hinton, 155 Miss. 173, 177, 125 So. 271 (1929): "It is manifest that many things ordinarily in existence and use throughout the country are both attractive and dangerous to children, and to hold that such things amount to an implied invitation to enter would be contrary to reason, lead to vexatious and oppressive litigation, and impose upon property owners such a burden of vigilance and care as would materially impair the value of property and seriously cripple the business of the country."

[28]155 Miss. 588, 600, 124 So. 795, 797 (1929): ". . . there is no room in this case for the application of the attractive nuisance doctrine."

[29]137 Miss. 229, 240, 102 So. 268, 270 (1924). The injury occurred to the trespassing child while he was playing around a planing mill and came into contact with a rapidly revolving unguarded shafting. ". . . the danger of such conduct was manifest, and the child was fully capable of and did appreciate the danger."

plaintiff was an infant trespasser to whom the duty to anticipate has been expanded.

> "Courts frequently find a form of words to achieve a result believed to be desirable, which enables the court both to show a decent respect for a hoary rule and at the same time perform a funeral oration over its corpse while gently but firmly laying it away to eternal rest."[30]

*Edythe Evelyn Gandy*

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## Conflict of Laws as to Adoption in Relation to the Inheritance of Property

In the field of conflict of laws one of the many problems to be considered is the effect of this conflict on adopted children. This subject in itself may be divided into two fields; the first dealing with jurisdiction of states to create adoption, and the second with the effect of this adoption on the rights of the adopted child in other states. In this study of the problem it will be assumed that there has been a valid adoption in one state, and the only question discussed will be the right of an adopted child to inherit under the laws of another state. It is well recognized that in so far as inheritance of immovables is concerned the controlling law is that of the state in which the land is situated, *lex rei sitae,* and that the law controlling inheritance of personal property is that of the domicil of the decedent, *lex domicilii,* except in Mississippi and Illinois where *lex rei sitae* governs inheritance of personal as well as real property.[1] The important consideration, then, is what are the conflict of laws rules governing inheritance by children adopted in states other than that in which the property of a decedent is situated or that in which he died domiciled.

In this field of the law there are three well defined groups of cases, each of which lays down a rule which purports to govern the entire field. The first of these rules is that adoption has no extra-territorial effect in regard to the inheritance of property. The second rule is that the adoption establishes both the status and the constituent detailed rights of inheritance, which may be neither enlarged nor diminished by the law of the state controlling inheritance. The third rule is that the status and a right of inheritance are set up by the state creating adoption and will be recognized and given effect in other states in so far as they do not violate the public policy of such states, but the detailed rights of inheritance will be given by the laws of the state controlling inheritance.

The first rule mentioned—*adoption has no extraterritorial effect with respect to the inheritance of property*—seems to derive from an old rule of the common law of England dealing with the inheritance of property.

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[30]Eldredge, *Tort Liability to Trespassers* (1938) 12 Temp. L. Q. 32, 35.

[1]Miss. Code Ann. (1930) § 1401; Stumberg, Conflict of Laws (1927) 379, n. 11.

This rule is set out in the statute of Merton[2] and provides that only a child born in wedlock can inherit property in England. In view of this rule and English cases upholding it, a New Jersey court in the case of *Frey v. Nielson,*[3] held that adoption in New York gave no right to inherit real property in New Jersey. This court said that the common law rule had been changed by the express terms of the New Jersey statute by which children adopted in that state were given a right to inherit, but that this statute changed the common law only in regard to children adopted in that state and that, therefore, a child adopted in New York could not inherit property in New Jersey.

In the case of *Brown v. Finley*[4] an Alabama court reached the same conclusion, holding that a child adopted in Georgia acquired through this adoption no right to inherit real property in Alabama. The court based this decision upon much the same reasoning as that of the New Jersey court.

In the case of *Hood v. McGehee*[5] the United States Supreme Court upheld the right of the Alabama court to refuse to allow a child adopted in a foreign jurisdiction to inherit property in Alabama. It was therein said that the "full faith and credit clause" of the Federal Constitution did not compel Alabama to allow inheritance in such a case, for when Alabama recognized the status of adoption created by the laws of another state it had fulfilled its obligation to this sister state, and that under the rule that *lex rei sitae* governs the descent of real property, the state of Alabama had the power to control the inheritance of this property.

The second rule—*adoption establishes both the status and the constituent detailed rights of inheritance, which may be neither enlarged nor diminished by the law of the state controlling inheritance*—has been laid down in several cases. In the case of In re *Sunderland*[6] a child was adopted under a special act of the legislature of Louisiana. This child, relying upon the Louisiana statute, asserted the right to inherit property in Iowa from the father of her adoptive father. The court held, however, that the Louisiana statute of adoption must be looked to in order to determine whether the appellant could inherit through her adoptive father, and as the Louisiana statute provided that appellant would inherit "from" him it meant that appellant could inherit only *from* him and not *through* him. This case seems to support the rule here stated, for the court looked to the state that created the adoption to determine the extent to which the appellant could inherit by the adoption and then refused to enlarge this right of inheritance in accordance with the statutes of Iowa. But this holding has been explained as one dealing simply with the interpretation of a Louisiana statute creating an adoption and can not be carried to the extent of supporting the general rule laid down above.

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[2]Taintor, *Legitimation, Legitimacy and Recognition in the Conflict of Laws* (1940) 18 CAN. B. REV. 712, 713.

[3]99 N. J. Eq. 135, 132 Atl. 765 (1926).

[4]157 Ala. 424, 47 So. 577, 21 L. R. A. (N. S.) 679, 131 Am. St. Rep. 68, 16 Ann. Cas. 778 (1908).

[5]237 U. S. 611, 35 Sup. Ct. 718, 59 L. ed. 1144 (1915).

[6]60 Iowa 732, 13 N. W. 655 (1882).

In *Boaz v. Swinney,*[7] later overruled by In re *Riemann,*[8] a child was adopted in Illinois where there was a provision in the adoption statute that as "to all other persons" (except adoptive parents) "the adopted child shall stand related as if no such act of adoption had been taken," while in Kansas where the land was situated, there was no such restriction. The Kansas court decided that the statute of Illinois under which the plaintiff was adopted restricted her right to inheritance from her parents only, and, as this right had been established in the state of adoption, it could not be enlarged by the law of Kansas.[9]

In the case of *Shaver v. Nash*[10] a child adopted in Texas claimed inheritance in Arkansas as a pretermitted child under statutes of both Texas and Arkansas which provide that a testator will be regarded as dying intestate as to such a child. The court held that the adopted child was not protected because under the law of Texas an adopted child was not regarded as the child of the adoptive parent in the sense that the word is used in this statute and that the law of Texas, the state where the child was adopted, is the law which defines the rights of the child to inherit and these rights as defined by that law can not be enlarged by the law of the state controlling inheritance.

It will be perceived that these cases do not support the second rule to its full extent as they deal only with the problem of enlargement of the rights of the adopted child to the extent of allowing it to inherit as would a child adopted in the state where the property is controlled; and that none of them deal with the problem of diminution of these rights. That is to say, no case has been found in which it appears that a court was willing to allow a foreign adopted child rights of inheritance greater than those provided by its own laws of inheritance.

The case of *Slattery v. Hartford-Connecticut Trust Company*[11] might be interpreted to be a case of this latter group. Here the court was faced with the problem of whether a child adopted in Michigan, where adopted children inherit from both adoptive and natural parents, could inherit property in Connecticut from its natural parent, when by the laws of Connecticut an adopted child could inherit only from its adoptive parent. The court held that the adopted child could inherit from its natural parent in Connecticut for this child had not been adopted in Connecticut and was thus not placed under the restrictions of the Connecticut statutes. It may seem that a court here was allowing a child adopted in another state greater rights than those of its own adopted children. But the force of this case is greatly reduced when it is realized that what the Connecticut court did was to recognize, not that the Michigan statute of adoption gave the

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[7]79 Kan. 332, 99 Pac. 621 (1909).
[8]124 Kan. 539, 262 Pac. 16 (1927).
[9]The New Hampshire court made a similar decision in a case involving the same problem in Meader v. Archer, 65 N. H. 214, 23 Atl. 521 (1889), and this decision would seem to have put New Hampshire in line with the states adopting the second rule; but the later decision of Anderson v. French, 77 N. H. 509, 93 Atl. 1042 (1915), did much to place New Hampshire within the states under the third rule although it did not expressly overrule Meader v. Archer, *supra.*
[10]181 Ark. 1112, 29 S. W. (2d) 298, 73 A. L. R. 961 (1930).
[11]115 Conn. 163, 161 Atl. 79 (1932).

adopted child a right to inherit from his natural parent but that this right which was his by birth, was not taken away from him by the Michigan statute. It appears then that this case supports, not the second rule, just discussed, but the third rule, discussed below. In other words, the Connecticut adoption statute, which removed the child from its natural family and placed it in the adoptive family, was not taken as an indication of a public policy opposed to an adoption statute which, while it placed the child in the adoptive family, left it, also, a member of its natural family.

The third rule to be considered is that—*the status and a right of inheritance are set up by the state creating adoption and will be recognized and given effect in other states in so far as they do not violate the public policy of such states,*[12] *but the detailed rights of inheritance will be given by the laws of the state controlling inheritance.*[13]

The leading case in support of this rule is that of *Ross v. Ross.*[14] In this case a child, adopted under the laws of Pennsylvania, claimed the right to inherit property of its adoptive parents in Massachusetts. The court in deciding the case made the following statement, which is often quoted in other cases:

> "It is a general principle, that the status or condition of a person, the relation in which he stands to another person and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicil; and that this status and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those claiming succession or inheritance in his estate is to be ascertained by the law under which that status was acquired, his personal property is indeed, to be distributed according to the law of his domicil at the time of his death, and his real estate descends according to those provisions of that law which regulates the succession or the inheritance of persons having such status."[15]

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[12]Brewer v. Browning, 115 Miss. 358, 76 So. 267 (1917); Jones v. Blakenbury, 94 P. (2d) 92 (Cal. App. 1939); Appeal of Woodward, 81 Conn. 152, 70 Atl. 453 (1908); Mott v. First National Bank, 98 Fla. 444, 124 So. 36 (1929); Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628 (1893); McNamara v. McNamara, 303 Ill. 191, 135 N. E. 410 (1922); Markover v. Kraus, 132 Ind. 294, 31 N. E. 1047 (1892); Shick v. Howe, 137 Iowa 249, 114 N. W. 916, 14 L. R. A. (N. S.) 980 (1908); Gray v. Holmes, 57 Kan. 217, 45 Pac. 596 (1896); Pyle v. Fischer, 278 Ky. 287, 128 S. W. (2d) 727 (1939); Succession of Cadwell, 114 La. 195, 28 So. 140 (1905); Ross v. Ross, 129 Mass. 245, 37 Am. Rep. 321 (1880); *In re* Finkerzeller's Estate, 105 N. J. Eq. 44, 146 Atl. 656 (1929); Melvin v. Martin, 18 R. I. 650, 30 Atl. 467 (1894); Cribbs v. Floyd, 188 S. C. 443, 199 S. E. 677 (1938); Finley v. Brown, 122 Tenn. 316, 123 S. W. 359, 25 L. R. A. (N. S.) 1285 (1909); Martinez v. Guitierrez, 66 S. W. (2d) 678 (Texas App. 1933).

[13]Keegan v. Geraghty, 101 Ill. 26 (1881); McCann v. Daly, 168 Ill. App. 287 (1912); *In re* Riemann, 124 Kan. 539, 262 Pac. 16 (1927); Anderson v. Freach, 77 N. H. 509, 93 Atl. 1042 (1915); New York Life Ins. & Trust Co. v. Viele, 161 N. Y. 11, 55 N. E. 311 (1899); Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266 (1911); *In re* Dennis' Estate, 98 Vt. 424, 129 Atl. 166 (1925).

[14]129 Mass. 243, 37 Am. Rep. 321 (1880).

[15]*Id.* at 246, 37 Am. Rep. at 322.

The court in applying this principle held that there was no substantial difference between the laws of Pennsylvania and Massachusetts in regard to the creation of the adoption or the rights of the adopted child to inherit and, therefore, the state of Massachusetts would recognize the status of adoption created in Pennsylvania and its incident of inheritance, and the adopted child would inherit under the statute of descent and distribution of Massachusetts.

The application of this rule by the Illinois courts is worthy of notice for the courts of that state have used it to allow inheritance on the one hand and to deny it on the other. In *Van Matre v. Sankey*[16] it was held that an adoption in Pennsylvania created a status with its incidents of inheritance that would be recognized in Illinois so that the adopted child could inherit property in the latter state under its statute, for in the status and incident of inheritance created in Pennsylvania there was nothing inconsistent with the policy and law of Illinois. In the case of *Keegan v. Geraghty*[17] a child adopted in Wisconsin brought an action to enforce its right to property in Illinois as the sister of a natural child of the adoptive parents. The child contended that the Illinois statute of descent and distribution must be applied in determining whether the adopted child could inherit. It concluded that an adopted sister did not come within the term "sister" in the statute and that, therefore, the adopted child could not inherit in Illinois. The court made its reasoning clear by saying that it was immaterial whether the adopted child could inherit as a sister in Wisconsin for, even if she could, this would be in conflict with the laws of descent and distribution of Illinois and thus would not be enforced in Illinois.

In South Dakota, in the case of *Calhoun v. Bryant*,[18] the adoptive parent attempted to recover as the heir of the adopted child. The child was adopted under the laws of Illinois and by that law the adoptive parent could not inherit from the adopted child. The South Dakota court held that the status as created under the laws of Illinois was not contrary to the laws of South Dakota and thus would be recognized, but that the incidental right of inheritance was governed by the law of South Dakota, and, as by the law of that state there was no restriction on an adoptive parent inheriting from an adopted child, such parent could inherit.

The Tennessee case of *Finley v. Brown*[19] is particularly interesting, for it concerned the same adoption as that in *Brown v. Finley*,[20] considered previously, and reached the opposite result. In *Brown v. Finley* the Alabama court refused to recognize a Georgia adoption as giving the right to inherit land in Alabama. In *Finley v. Brown,* however, the Tennessee court recognized the Georgia adoption and its incident of inheritance, for they were not in conflict with the law and policy of Tennessee, and allowed the adopted child to inherit property under the laws of Tennessee.

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[16]148 Ill. 536, 36 N. W. 628 (1893).
[17]101 Ill. 26 (1881).
[18]28 S. D. 266, 133 N. W. 266 (1911).
[19]122 Tenn. 316, 123 S. W. 359, 25 L. R. A. (N. S.) 1258 (1909).
[20]157 Ala. 424, 47 So. 577 (1908).

A recent case does much to nullify the weight of *Frey v. Nielson,*[21] a case previously discussed, where in 1926 the New Jersey court refused to recognize an adoption under New York law to the extent of allowing the adopted child to inherit real property in New Jersey. Three years later, in the case of *In re Finkerzeller,*[22] the same court held that the status and incident of inheritance of an adoption in New York would be recognized in New Jersey for they were not inconsistent with its laws and therefore the adopted child would inherit personalty under the laws of New Jersey. It is to be noted that *In re Finkerzeller* does not directly overrule *Frey v. Nielson* as the more recent case concerns personal, as opposed to real, property. However several statements in the opinion of the court tend to the conclusion that *Frey v. Nielson* will be overruled when the question is directly presented.

In the cases of *In re Riemann*[23] and *Anderson v. French,*[24] the courts of Kansas and New Hampshire, respectively, decided these cases upon the third rule. In so doing the Kansas court expressly overruled the case of *Boaz v. Swinney*[25] and the New Hampshire court by its language indirectly overruled the earlier decision of *Meader v. Archer.* [26] The second rule was followed in both of the earlier decisions; and, therefore, these later cases would appear to transfer the states from the group following the second rule to that following the third rule.

Before the Mississippi cases are considered in relation to these rules, it is best to consider how these rules were applied in the past cases and which of these rules it seems more logical to apply. The first rule merely represents the use by the courts of their power gained from the rules of property of *lex domicilii* and *lex rei sitae* to hold that adoption in a foreign state creates no rights of inheritance in the state controlling the property. This rule is not of great importance today for in most states a foreign adoption is recognized as creating a status which brings the adopted child within the word "child" in statutes of descent and distribution.

By using the second rule the courts controlling inheritance are saying that a part of the status of adoption is any limitation on the inheritance of adopted children under the laws of the state creating the adoption. When the state controlling inheritance recognizes this status of the foreign state it is necessary by the reasoning of these courts to accept this limitation as a part of the status. Therefore when they enforce this limitation they are not enforcing the inheritance laws of another state in regard to property within their control in opposition to the rules of property of *lex domicilii* and *lex rei sitae* but are only enforcing a restriction of the status which they have recognized. Nor is this rule of great importance for the cases

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[21] 99 N. J. Eq. 135, 132 Atl. 765 (1926).
[22] 105 N. J. Eq. 44, 146 Atl. 656 (1929).
[23] 124 Kan. 539, 262 Pac. 16 (1927).
[24] 77 N. H. 509, 93 Atl. 1042 (1915).
[25] 79 Kan. 332, 99 Pac. 621 (1909).
[26] 65 N. H. 214, 23 Atl. 521 (1889).

which support this rule are few and in several instances these cases have been overruled or limited by later cases decided in the same jurisdiction.[27]

Under the third rule the courts reason that the state creating the adoption purports to create this status alone without any limitation as to inheritance. That limitations in this field in the state of adoption are intended to be part of the law of inheritance and not of adoption. Therefore, the state controlling the inheritance can recognize this status and then determine whether its law of inheritance gives a right of inheritance to persons within that status. The courts, then, recognize the creation of the status of parent and child, and adoptive-parent and adopted-child, and give to those *status* the same incidents which they attribute to the same relations created under their own laws.

This is more in keeping with the treatment of the other static relations. In order to determine the rights of inheritance of husband and wives, no inquiry is made with respect to the rights of inheritance given by the law of the state under which the marital status was created. In cases of legitimation the only law consulted to determine whether the child can inherit is the law of succession of the state controlling inheritance. When confronted by the claim of a bastard or of a legitimate child, or of any blood relation, no court considers the rights of succession given by the law which created the bastardy, the legitimacy or other relationship, but only the law of succession of the state controlling inheritance. Why should the approach be different in cases concerning the relation of adoption?[28]

In the field of law considered in this paper there is only one Mississippi case—upon which there are two decisions, *Fisher v. Browning*[29] and *Brewer v. Browning,*[30] both dealing with the same adoption. This case will be noted in order to find which of the rules the Mississippi court applied in solving the problem presented. The facts of the case are: The adopting parents were domiciled in Mississippi and while on a visit to Kentucky adopted a child from a Kentucky orphanage. This orphanage, chartered under the laws of Kentucky, was an institution whose charter provided that articles of adoption from it should make the adopted child the heir at law of the adoptive parents and capable of inheriting as though it was their child. The adoptive parents covenanted that the adopted child "shall bear from this time forward the same relation to them as if she had been born unto them, and were their child, especially as to such property as would descend to her were she their child." After the making of this agreement the adoptive parents and child returned to Mississippi. In 1903 the adoptive father died. In the same year there was a suit filed

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[27]In Kansas the decision in Boaz v. Swinney, 79 Kan. 332, 99 Pac. 621 (1909), which was based on the second rule was overruled by the case of *In re* Riemann, 124 Kan. 539, 162 Pac. 16 (1927), which was decided by the third rule. Anderson v. French, 77 N. H. 509, 99 Atl. 1042 (1915), which used the third rule, did not expressly overrule the earlier case of Meader v. Archer, 65 N. H. 214, 23 Atl. 521 (1889), but it lessened the weight of this case when it refused to follow the second rule as had the earlier case.

[28]See Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266, 270-272 (1911).

[29]107 Miss. 729, 66 So. 132 (1914).

[30]115 Miss. 358, 76 So. 267 (1917).

in Mississippi to determine whether the adopted child could inherit from the adoptive father. The court decreed that she could. In 1905 the adopted child died. Then a suit was brought which involved the issue as to whether the natural brothers and sisters of the adopted child or the adoptive mother should inherit the land that the adopted child inherited from the adoptive father.

The Mississippi court in the case of *Fisher v. Browning* intimated that it would have decided that an adopted child would not inherit from its adoptive father. The court said that there was no doubt that the child had been adopted so she could inherit from her adoptive father in Kentucky but in Mississippi an adopted child gets only those rights given in the adoption decree, and that by the weight of authority a status created in one state will be recognized in another, provided always that the status and the rights incident to it are not inconsistent with the laws and public policy of the state where it is sought to have this status recognized. The court continued:

> "We do not believe, however, that this child was capacitated by the adoption in Kentucky to inherit lands in Mississippi, because the laws of Kentucky are inconsistent with and antagonistic to our Constitution and laws on the same subject, and to the public policy of Mississippi on that subject, as such public policy is found in our statutes and Constitution, and for that reason we do not believe that Mississippi is bound to recognize this adoption by contract, as it was made in Kentucky, to be valid and binding in Mississippi as to confer upon the child the capacity to inherit lands in Mississippi. . . . No such thing is known to the laws of Mississippi as adoption by contract, nor can it be done by special act of the legislature of Mississippi, by reason of section 90 of our Constitution. . . . The only way to interpret the statute of descent and distribution in Mississippi by way of adoption is that the adoption shall be made in accordance with the laws of the state of Mississippi. This is the clear public policy of our state by its Constitution, laws, and decisions, and what could not be done in Mississippi directly, to create capacity to inherit lands here, could not be done in Mississippi indirectly, and if this contract or adoption would be void under the laws of the state of Mississippi and is inconsistent with our public policy, then capacity cannot be given to inherit lands here by this indirect proceeding in the state of Kentucky."[31]

The court held that the land inherited by this adopted child from its adoptive father would go to its natural brothers and sisters under the laws of descent and distribution in Mississippi, and not to the adoptive mother for the adoption statute did not provide for inheritance by the adoptive parents from the adopted child and therefore the usual rule as to descent and distribution would apply. Justice Miller dissented strongly on this last ground of the opinion, on the theory that upon adoption with rights of inheritance the adopted child becomes a natural child of the

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[31] 107 Miss. 729, 737, 66 So. 132, 135 (1914).

adoptive family and that the adoptive mother could inherit as the mother of the child under the term "mother" in the statute of descent and distribution.

In *Brewer v. Browning* the court reconsidered *Fisher v. Browning.* In this case the court in considering the opinion of the earlier case said:

> "If we understand the opinion in the former case, it holds that it would be inconsistent with the laws and Constitution of Mississippi for an adopted child to inherit lands under the statutes of Mississippi. The court seems to have been of the opinion that it was not possible for an adopted child, adopted under the laws of Mississippi, to inherit as an heir of the adopting parent."[32]

It was then stated that it was "not contrary to the Constitution, laws, and public policy of Mississippi for a person to adopt a child so as to make it an heir and capable of inheriting both real and personal property."[33]

The court said, further, that when the status of adoption had been established by one state it should be recognized by every state so far as this was possible by its laws. By the adoption in this case it was intended to create a status of parent and child and this same status could be created by the adoption laws of Mississippi, and any person in the relationship of child to father can inherit from the father, though he become a "father" by adoption. The court continued:

> "We see no conflict, real or imaginary, between our laws and the laws of Kentucky on this subject. Under our law the adopting parent may adopt the child fully and completely, or it may adopt it and limit its rights by a decree of court. In other words, under our statutes the parent can either adopt partially or totally, conferring or withholding benefits at his option but if he confers upon the child full benefits as though it was a natural child, there is nothing to prevent his so doing, and there can be no inconsistency between our law and the law of Kentucky as applied to the present adoption."[34]

For these reasons the court held that the adoptive mother could inherit from the adopted child the property that the child inherited from the adoptive father. This was on the ground that upon the Kentucky adoption the adopted child became the legal child of the adoptive family in the same way as a natural child[35] and thus was a natural child within the Mississippi statutes of descent and distribution.

The court in *Fisher v. Browning,* in saying that the adopted child could not inherit from the adoptive father, used language that leads to confusion when an attempt is made to place the decision within one of the rules. It would seem at first glance that the court applied the first rule for it said that the adoption in Kentucky would not be given effect

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[32] 115 Miss. 358, 368, 76 So. 267, 271 (1917).
[33] *Id.* at 368, 76 So. at 271.
[34] *Id.* at 371, 76 So. at 272.

in Mississippi but the reason it gave for this decision was that the adoption was not performed in Kentucky in the same form as an adoption in Mississippi. This statement takes the case from the first rule—for in applying this rule the court would reason that no adoption in a foreign state, even if it followed the same form as that of the state controlling inheritance, would be recognized for purposes of inheritance in the state of inheritance. Upon further consideration, however, it seems that the court applied the third rule. The court said that the adoption in Kentucky was performed in such a way as to create the status of adoption in Mississippi but not in such a way as to allow the adopted child to inherit under the laws of Mississippi. Inheritance would be refused to this adopted child, the court stated, for the reason that it would be opposed to the laws and public policy of Mississippi to allow an adoption in such form to place the adopted child within the word "child" in the Mississippi statute of descent and distribution. It is submitted that the court correctly used the third rule in denying the right of an adopted child to inherit from its adoptive father.

In the case of *Brewer v. Browning* the court used the third rule to reach the conclusion that an adopted child could inherit from its adoptive father. This court said that the status of adoption created in Kentucky and also its incident right of inheritance would be recognized in Mississippi; for it was believed that this status and right of inheritance were not opposed to the laws and public policy of Mississippi and a child adopted in this manner in Kentucky would come within the word "child" in the statutes of descent and distribution. It is submitted that the court correctly used the third rule to reach its conclusion.

In both of these opinions differently constituted courts correctly used the third rule but they simply disagree as to the laws and public policy of Mississippi when it is applied to a child adopted in the form prescribed in Kentucky. As both courts applied this third rule, it seems clear that the courts of Mississippi will follow this rule; the form of the adoption as long as it is in accordance with the laws of the state of adoption will be recognized in this state as effective; and a foreign-adopted child will inherit as a "child" in this state.

It is submitted that the decision in the *Brewer* case that the adoptive mother could inherit from the adopted child was correct. The court in that case appeared to assume that by the laws of Kentucky an adopted child became a member of the adoptive family in the same way as if it had been a natural and legitimate child. When this status was recognized in Mississippi the court of this state regarded the child as a member of the adoptive family. Therefore when the statute of descent and distribution was applied to the property of this child it was held that the adoptive mother could inherit as the "mother" of the adopted child.

Three problems remain unsolved. First: Suppose a child is adopted in another state under a statute which does not completely remove it from its natural family. Will such a child inherit property in Mississippi from its natural family? Second: Suppose a child so adopted does inherit from its natural family. Who will inherit from it if it dies intestate, leaving neither spouse nor descendants? Third: Suppose a child so adopted ac-

quires property through its own efforts and dies intestate, leaving neither spouse nor descendants. Who will inherit from it?

The first question is probably answered by *Sledge v. Floyd*.[36] In that case a child was adopted in Mississippi under a decree which made "said child an heir at law with all the legal benefits growing out of such relation." It was held that the child inherited from its natural parents, upon the ground that

> " . . . nothing in the adoption proceedings themselves nor in the statutes authorizing them deprives a child of the right to inherit from its blood relatives . . . To do so would raise grave questions where a child having expectations should be adopted against its consent or without its power to consent during the tender years of minority and thus be deprived of benefits."[37]

Consideration of the attitude of the court in *Brewer v. Browning* leads to the conclusion that an adopted child who, under the laws of the state controlling the adoption, is not removed from its natural family, will inherit from that family under the laws of Mississippi. *Sledge v. Floyd* makes it clear that nothing in the laws and policy of Mississippi militates against an adoption which, while it puts a child in the adoptive family, does not remove from its natural family for purposes of inheritance from that family.

The second question may be answered by *dictum* in *Brewer v. Browning* where it was said:

> "It is more consistent with justice to hold that the property inherited by [the adopted child] from [the adoptive father] should go to that line of legal heirs through which it was derived."[38]

It may be that the court will also believe that it is more consistent with justice that property inherited by the child from its natural father should go to the legal heirs in the natural family.[39]

Since, however, in both *Sledge v. Floyd*[40] and *Brewer v. Browning*[41] the court showed clearly that the important reason for the decisions reached was the benefit to the child, it may be that the court will decide this question in favor of or against the natural family depending upon its opinion as to the tendency of a refusal to allow reinheritance of property coming from the natural family to impel the natural parents to refuse their consent to an adoption which will be beneficial to the child. Thus

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[35]In the words of Justice Ethridge in the *Brewer* case the child was totally adopted under the laws of Kentucky. On this point Chief Justice Smith dissented for it was his opinion that the child was not so adopted as to become a child of the adoptive family within the Mississippi statute of descent and distributon, but that the natural brothers and sisters of the child would inherit under this statute.

[36]139 Miss. 398, 104 So. 163 (1925).

[37]*Id.* at 408, 104 So. at 165.

[38]Brewer v. Browning, 115 Miss. 358, 372, 76 So. 267, 272 (1917).

[39]*Contra:* Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266 (1911).

[40]See quotation in the text, *supra*, at note 36.

[41]115 Miss. 358, 372, 76 So. 267, 272 (1917).

the court may allow such reinheritance only if it believes that otherwise the natural parents may refuse to consent for selfish reasons.

One consideration which may influence the court is this. If it allows the adoptive parents to inherit, as in *Brewer v. Browning* and allows the natural parents to reinherit property coming to the child from that family it will have read into the statute of descent and distribution the doctrine of descent from the first purchaser which it was held in *Doe v. Deloach*[42] does not exist in this state.

The third problem—inheritance from a foreign-adopted child who has acquired property otherwise than by inheritance—appears to be solvable in any one of three ways: the adoptive family can inherit; the natural family can inherit; or both can inherit.

A decision that the adoptive family can inherit may be based upon the consideration that in *Brewer v. Browning* it was said that the adoptive mother was the "mother"[43] within the meaning of the statute of descent and distribution. A decision in favor of the natural family may be based upon consideration of the fact that this was said in connection with inheritance of property inherited by the child from the adoptive father. A decision in favor of both families may be based upon consideration of the facts that the court has said that the adoptive mother was the "mother" and that, by hypothesis, the child has not been removed from its natural family and that, therefore, the natural mother is also the "mother".

Selection among these three rules may be influenced by the fact that it is to be assumed that the adoptive parents, by adopting the child and caring for it, greatly increase its chances of acquiring property through its own efforts. It will be perceived that this consideration may affect the solution of the problem of inheritance of property inherited from the natural family. The suggestion is that the adoptive parents voluntarily confer a benefit on the child and take considerable burdens upon themselves to that end, and that it may be more consonant with justice that they receive all the benefits which arise from the relationship of parent and child in preference to the natural parents who, by consenting to the adoption, rid themselves in fact of the greater part if not all of those burdens which were imposed upon them by law for the benefit of the child.[44]

*H. C. Macfarlane.*

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[42]1 How. 32 (Miss. 1834).

[43]Brewer v. Browning, 115 Miss. 358, 370, 76 So. 267, 271 (1917).

[44]No fear that persons will effectively adopt children in order to inherit from them need be entertained. An adoption for such a purpose constitutes fraud upon the court and will be set aside, even after the death of the child. Platt v. Magnini, 110 Wash. 39, 187 Pac. 716 (1920).

# RECENT DECISIONS

## Master and Servant—Tort Liability to Third Persons—Recovery or Collectible Judgment Against Servant as Bar to Separate Action Against Master

The servant of the defendant, while acting within the scope of his employment, operated his automobile in a negligent manner and the plaintiff was injured. A judgment was recovered against the servant, but the plaintiff refused a tender of payment, and subsequently brought an action for damages against the master because of his vicarious liability. Held: Having had knowledge of the master and servant relationship at the time the suit was prosecuted against the servant, the plaintiff cannot in a subsequent action obtain a judgment against the master, whose liability is but a derivative of the tort of his servant, the sole actor in the commission of the wrong. The master's liability is merged into the judgment recovered against the servant, if that judgment is collectible. *Granquist v. Crystal Springs Lumber Co.*, 1 So. (2d) 216 (Miss. 1941).

The doctrine of *respondeat superior* was created in answer to the demands of social policy and justice to insure to the injured party reimbursement from the master for any loss which he might have suffered by an act of the servant, who was acting within the scope of his employment. The loss is thereby placed upon the one who is in the best position to sustain it.

A few courts hold that the liability of the master is primary and is not predicated solely upon the negligence of the servant. The courts adopting this view consider the master and servant as a joint tortfeasors, in which case the recovery of a judgment against one of the joint tortfeasors does not bar a recovery against the other, until there has been satisfaction.[1] In these jurisdictions a verdict acquitting the servant, or making no finding as to him at all, will not undermine a judgment against the master.[2]

But is it generally held that the liability of the master is secondary and depends entirely upon the negligence of the servant. The courts taking this position apparently agree that a judgment against one of the parties bars a recovery against the other.[3] In a few jurisdictions, however, a prior judgment against the servant will not defeat subsequent proceedings against the master,[4] and vice versa.[5]

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[1] 1 Cooley, Torts (4th ed. 1932) § 82.

[2] Melzner v. Raven Copper Co., 47 Mont. 351, 132 Pac. 552 (1913); Garrison v. Everett, 112 Neb. 230, 199 N. W. 30 (1924); Dunbadden v. Castles Ice Cream Co., 103 N. J. L. 427, 135 Atl. 886 (1927); Bennett v. Eagleke, 148 Atl. 197 (N. J. 1930); Miller v. Alaska S. S. Co., 139 Wash. 207, 246 Pac. 296 (1926).

[3] McNamara v. Chapman, 81 N. H. 169, 123 Atl. 229, 31 A. L. R. 188 (1923); Wolf v. Kenyon, 242 App. Div. 116, 273 N. Y. Supp. 170 (1934); cited *infra* note 16; Betcher v. McChesney, 255 Pa. 394, 100 Atl. 124 (1917) cited *infra* note 28 (may be merely *obiter dicta*); Raymond v. Capobianco, 107 Vt. 295, 178 Atl. 896, 98 A. L. R. 1051 (1935)

[4] Gordon v. Cross & Roberts, Inc., 287 Mass. 362, 191 N. E. 407 (1934); Gadson v. Craft & Co., 175 N. C. 358, 95 S. E. 610 (1918); Maple v. Cincinnati, H. & O. R. R., 40 Ohio St. 313 (1883); Rookard v. Atlanta & C. Airline Co., 84 S. C. 190, 65 S. E. 1047 (1909).

In Brennan v. Huber, 112 Pa. Super. 299, 171 Atl. 122 (1934), assuming that the master and servant were severally liable and not jointly so, it was said that a judgment is a security for the original cause of action until it is satisfied. Until it is satisfied "it cannot operate to change any other collateral or concurrent remedy" which the plaintiff has.

[5] In Huey v. Dykes, 203 Ala. 231, 82 So. 481 (1919) a judgment against, and even tender of payment by the Master, did not bar an action against the servant.

By the majority rule a verdict against the master and exonerating the servant will not support a judgment in favor of the injured party, since, in theory, the verdict negatives negligence on the part of the servant, making it contradictory to render a judgment against the master.[6] These views are followed by the court in the case at hand,[7] but it is interesting to note that Mississippi once adhered to the view that the master's liability is primary.[8] The instant case has the effect of seriously restricting those earlier decisions.

There are several judicial methods which have been used by courts to make the prosecution of a remedy to judgment a bar to the subsequent pursuit of an inconsistent remedy arising out of the same facts.

The principal case uses the doctrine of merger. When a judgment has been obtained against a party, it operates to merge the original claims and causes of

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[6]Walker v. St. Louis-San Francisco Ry., 214 Ala. 492, 108 So. 388 (1926); McGinnis v. Chicago, R. I. & Pac. Ry., 200 Mo. 347, 98 S. W. 590 (1906); Pangburn v. Buick Motor Co., 211 N. Y. 228, 105 N. E. 423 (1914). When the verdict makes no finding as to the servant, the same result follows. Dare v. Boss, 111 Or. 190, 224 Pac. 646 (1924). For a full discussion see: Notes (1930) 78 U. of Pa. L. Rev. 904, (1927) 11 Minn. L. Rev. 568, (1916) 16 Col. L. Rev. 164.

[7]It is stated in this case that the liability of the master and servant is joint and several, but they are not joint tortfeasors, because the master's liability is secondary and is dependent upon the negligence of the servant. There is no contribution between joint tortfeasors, but it is well settled that the servant is answerable to his master for any damage which the master may be compelled to pay for his wrongful acts, unless those acts were directed by the master. Labatt, Master and Servant (1913) § 2231.

The plaintiff relied on Nelson v. Illinois Cent. R. R., 98 Miss. 295, 53 So. 619, 31 L. R. A. (n. s.) 689 (1910), to support his contention that the subsequent action against the master would not be barred. This case, however, is not directly in point, for the defendants were treated as joint tortfeasors, and the rules applicable thereto were correctly invoked.

A comparatively recent Mississippi decision which confuses the liabilities of joint tortfeasors with the liabilities of master and servant is Thomas v. Rounds, 161 Miss. 713, 137 So. 894 (1931). The servant, while on his master's business, negligently ran into and injured the plaintiff. The master and servant were sued jointly, and a judgment was rendered against the master alone, from which judgment he appealed. In affirming the decision of the lower court, it was said: "Tortfeasors are jointly and severally liable, and they are not entitled to contribution between themselves."

[8]In Illinois Central R. R. v. Clarke, 85 Miss. 691 (1904) the plaintiff brought a joint action against the railroad company and the engineer, but the engineer was acquitted from all liability. It was held that the defendants were jointly and severally liable, and the fact that the jury failed to find a verdict against the servant, in no way prejudiced the rights of the master against the servant.

The same situation existed in St. Louis & S. F. R. R. v. Sanderson, 99 Miss. 148, 54 So. 885, 46 L. R. A. (n. s.) 352 (1911). Although the decision of the case turned upon a procedural statute [Miss. Code Ann. (1906) § 4944], the court stated: "The liability of joint trespassers is several, and any one or all of them may be sued for the entire wrong. Consequently . . . a dismission or release of one or more who are sued, cannot per se release the others."

If the view adopted in these cases had been applied in the instant case, it is very likely that the judgment against the servant would not have been a bar to the recovery of a separate judgment against the master.

action into that judgment.[9] The result was reached in early cases upon the hypothesis that the cause of action was merged in the judgment because of the higher nature of the judgment.[10] Another reason is that a new suit would lead to excessive and vexatious litigation, injurious to the defendant and of no benefit to the plaintiff.[11] Also, public policy would not permit the re-trial of an adjudicated matter.[12] Now the doctrine of merger has become so extensively used that it has almost become independent of the reasons suggested for its support.[13]

As applied to the master and servant cases, the effect of a judgment against the servant alone is held in the instant case to merge not only that claim which the plaintiff has against the servant, but also the independent cause of action which exists against the master.[14]

The court in the principal case cites two cases as authority in support of its decision.[15] The facts and conclusions reached are the same as in the case at hand, but the results are based upon the separate doctrine of "election of remedies." Authority is also given from which it may be inferred that a like result would follow if a collectible judgment is first recovered against the master, and ensuing litigation is attempted against the servant.[16]

Many courts have used the doctrine of "election of remedies" to preclude the plaintiff from subsequently resorting to a remedy inconsistent with the one formerly pursued. Although the court in the case at hand does not mention "election," it has applied the doctrine in earlier Mississippi decisions in other connections.[17]

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[9]Pigford Grocery Co. v. Wilder, 116 Miss. 233, 76 So. 745 (1917); Schwartz Bros. & Co. v. Stafford, 166 Miss. 397, 148 So. 794 (1933). *See* 2 FREEMAN, JUDGMENTS (5th ed. 1925) § 546.

[10]Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. ed. 707 (1887); North v. Mudge, 13 Iowa 496, 81 Am. Dec. 441 (1860); McKittrick v. Cahoon, 89 Minn. 383, 95 N. W. 223, 62 L. R. A. 757, 99 Am. St. Rep. 606 (1903).

[11]United States v. Oregon Lumber Co., 260 U. S. 290, 43 Sup. Ct. 100, 67 L. ed. 261 (1922); Bacon v. Reich, 121 Mich. 480, 80 N. W. 278, 49 L. R. A. 331 (1899); Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720 (1901).

[12]Murphy v. Hutchinson, 93 Miss. 643, 48 So. 178, 2 L. R. A. (N. S.) 785 (1909); Winters v. Bisaillon, 153 Or. 509, 57 P. (2d) 1095, 104 A. L. R. 968 (1936).

[13]2 FREEMAN, JUDGMENTS (5th ed. 1925) § 546.

[14]For an excellent discussion of the doctrine of merger in this general connection see Clayton, *Election Between the Liability of an Agent and of His Undisclosed Principal* (1925) 3 TEXAS L. REV. 384, 390.

[15]Betcher v. McChesney, 255 Pa. 394, 100 Atl. 124 (1917); Raymond v. Capobianco, 107 Vt. 295, 178 Atl. 896, 98 A. L. R. 1051 (1935). In the second case the master and servant were held not to be jointly, but severally liable for the tort of the servant, and recovery of a judgment against the servant was deemed to be an "election of remedies," precluding the institution of a subsequent action against the master. This case is severely criticized in (1936) 45 YALE L. J. 920, (1936) 36 COL. L. REV. 324.

[16]McNamara v. Chapman, 81 N. H. 169, 123 Atl. 229, 31 A. L. R. 188 (1923). In Wolf v. Kenyon, 242 App. Div. 116, 273 N. Y. Supp. 170, 174 (1934) it was said: "The plaintiff now seeks to try those same identical issues again. He has had one day in court on them and now he seeks a second. . . . Upon both principle and precedent the plaintiff cannot succeed."

[17]Madden v. Louisville Ry. Co., 66 Miss. 258, 6 So. 181 (1889); Murphy v. Hutchinson, 93 Miss. 643, 48 So. 178, 21 L. R. A. (N. S.) 785, 17 Ann. Cas. 611 (1909); Rea v. O'Bannon, 171 Miss. 824, 158 So. 926 (1935).

In Warriner v. Fant, 114 Miss. 174, 74 So. 822 (1917) it was said that there are "elements of estoppel" in the doctrine of "election." If this is so, does not this interpretation deprive the doctrine of "election of remedies" of all excuse for its existence as a separate and distinct rule of law?

An "election of remedies" is irrevocable and conclusive, and constitutes an absolute bar to an action based upon any remedial right inconsistent with the one asserted by the "election,"[18] if it is made without mistake,[19] and with full knowledge of the "co-existant, inconsistent, remedial rights."[20]

There is great conflict and difference of opinion as to what acts on the part of the plaintiff constitute an "election of remedies." In an early leading case it was held that any "decisive" act was sufficient to constitute an "election."[21] Many courts following have been greatly troubled with what is, and what is not, a "decisive" act. Most courts hold that there has been an "election" by the mere commencement of an action, if made in the absence of ignorance, mistake, or other legal excuse.[22] But it is often held that there has been no "election" unless the plaintiff has been benefited by, or caused detriment to the other party, or has fol-

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[18]The basis for the doctrine goes back to the technical common law forms of action and procedure. Where a party had two inconsistent remedies, as contract and tort, against another person, joinder of the inconsistent causes was prohibited, and an "election" required. The remedy against a master who must answer for the tort of his servant is in case, while the remedy against the servant is for trespass; thereby necessitating the "election." This reasoning apparently has been repudiated by those courts which allow joinder of the master and servant in a single cause of action. Putnam Memorial Hospital v. Allen, 34 F. (2d) 927 (C. C. A. 2d, 1929); Clark v. Cliffside Park, 110 N. J. L. 589, 166 Atl. 309 (1933); Note (1935) 98 A. L. R. 1057. But the common law is probably responsible for the continued presence of this rule in a minority of the jurisdictions which refuse to modify their restrictions on the joinder of causes and parties. Warax v. Cincinnati, N. O. & T. P. R. R., 72 Fed. 637 (Ky. 1896); The Jungshoved, 290 Fed. 733 (C. C. A. 2d, 1923); Raymond v. Capobianco, 107 Vt. 295, 178 Atl. 896, 98 A. L. R. 1051 (1935), cited *supra* note 15.

[19]Fireman's Fund Ins. Co. v. Gulf Transp. Co., 135 Miss. 537, 99 So. 515 (1924); Mississippi Power & Light Co. v. Pitts, 181 Miss. 344, 179 So. 363 (1938) (mistaken pursuit of an action in tort not a bar to subsequent prosecution of action in contract); Thomas v. Sugarman, 218 U. S. 129, 30 Sup. Ct. 650, 54 L. ed. 967 (1909); Hofman v. Hofman, 108 N. J. Eq. 161, 154 Atl. 518 (1931).

[20]In Madden v. Louisville Ry., 66 Miss. 258, 275, 6 So. 181, 183 (1889) Judge Campbell on suggestion of error cited the following from Watson v. Watson, 128 Mass. 152, 155 (1880): "An election made in ignorance of material facts is, of course, not binding, when no other person's rights have been affected thereby. So, if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election will be presumed." See also Rives v. McNeil, 127 Miss. 839, 90 So. 595 (1921); Rea v. O'Bannon, 171 Miss. 824, 158 So. 916 (1935); Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. ed. 55 (1894); Tremarco v. Tremarco, 117 N. J. Eq. 50, 174 Atl. 898, 95 A. L. R. 231 (1934). *But see* Clayton, *Election Between the Liability of an Agent and of His Undisclosed Principal* (1925) 3 TEXAS L. REV. 384. The author, in clinging to the doctrine of merger, asserts that a judgment obtained before knowledge of the principal's existence is a binding election. The cause of action is merged, and is "drowned" in the judgment, whether or not the plaintiff knows that he can proceed against another.

[21]Sanger v. Wood, 3 Johns. Ch. 416 (N. Y. 1818).

[22]Quitman County v. Miller, 150 Miss. 841, 117 So. 262 (1928); United States v. Oregon Lumber Co., 260 U. S. 290, 43 Sup. Ct. 100, 67 L. ed. 261 (1922); Zanzonico v. Zanzonico, 14 N. J. Eq. 674, 186 Atl. 779 (1936); McMahan v. McMahon, 122 S. C. 336, 115 S. E. 293, 26 A. L. R. 1295 (1922).

lowed his remedy to a final judgment.[23] Other courts state that there must be a final judgment,[24] or even satisfaction.[25]

In the principal case it is apparent that the plaintiff was not satisfied with the amount of the judgment obtained against the servant, and wanted to re-litigate the whole matter in a separate action against the master. This the court would not allow on principles of justice. Either of the above discussed methods would have accomplished this result.

If these doctrines are applied strictly and without exception, a remedy which is prosecuted to the recovery of judgment against the servant will be a bar to the pursuit of an inconsistent remedy against the master, whether that judgment is collectible or not. But it is inferred in the instant case that the court will attempt to do substantial justice between the parties if the judgment is not collectible, and will allow the adoption of the inconsistent remedy.[26]

To place upon the injured party the burden of an "election" between inconsistent remedies is unwarranted and severe. It generally operates to the advantage of the wrongdoer and to the detriment of the party who is seeking redress.

Although the doctrines of "election of remedies" and merger have been extensively applied in this and many other fields of law, they have recently become the subject of much criticism.[27] They would be less open to adverse comment if they were cautiously applied only in case an action is vexatiously brought. If the plaintiff has acted in good faith, there is no reason why he should be arbitrarily restrained from recovering damages which are justly due him. Both the master and servant are under obligation to him, and there seems to be no justification in allowing either to escape liability before the plaintiff's claim has been satisfied.

Perhaps the most equitable result in the end would be to permit the plaintiff to sue the master at any time, but after a judgment has been obtained against the servant, consider it *res judicata* as to the maximum amount of liability of the

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[23]Frederickson v. Nye, 110 Ohio St. 459, 144 N. E. 299, 35 A. L. R. 1163 (1924); Gem Motor Co. v. Securities Investment Co., 16 Tenn. App. 608, 65 S. W. (2d) 590 (1933). *Contra:* Belding v. Whittington, 154 Ark. 561, 243 S. W. 808, 26 A. L. R. 107 (1922); Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803 (1890).

[24]Cohoon v. Fisher, 146 Ind. 583, 44 N. E. 664, 36 L. R. A. 193 (1896); Elna Realty Co. v. Mamaquarro Apts. Corp., 234 App. Div. 105, 254 N. Y. Supp. 329 (1931).

[25]Crittenden v. St. Hill, 34 Cal. App. 107, 166 Pac. 1016 (1917); Brennan v. Huber, 112 Pa. Super. 299, 171 Atl. 122 (1934), cited *supra* note 4.

[26]Judge Griffith in rendering this decision said: ". . . the liability of the principal or master . . . becomes merged into the judgment recovered against the agent or servant if that judgment be collectible, for that the wrong has been legally satisfied and no subsequent or separate action against the principal or master will be allowed." 1 So. (2d) 216, 218.

[27]Hine, *Election of Remedies, A Cricitism* (1913) 26 HARV. L. REV. 707, 719. "The modern rule of election of remedies is a weed which has recently sprung up in the garden of the common law, its roots stretching along the surface of *obiter dicta* but not reaching the subsoil of the principle. The judicial gardeners through whose carelessness it has crept in should be able to eliminate it, or at least prevent its further growth." Rothschild, *A Remedy for Election of Remedies: A Proposed Act to Abolish Election of Remedies* (1929) 14 CORN. L. Q. 141; Deinard & Deinard, *Election of Remedies* (1922) 6 MINN. L. REV. 341; *Id.* at 480; Notes (1938) 38 COL. L. REV. 292; (1922) 36 HARV. L. REV. 593; (1934) 13 OR. L. REV. 298.

master.[28] Since the liability of the master is a derivative of and dependent upon the negligence of the servant, a decision on the merits in favor of the servant would be *res judicata* as to the liability of the master. An analagous situation exists in the case of principal and surety.[29]

If this had been the position taken by the court in the case at hand, the lengthy discussion of merger would have been needless. In this case the servant tendered payment of the judgment which had been recovered against him. With knowledge of the fact that it would be impossible to recover a greater amount, the plaintiff would have accepted the tender, and would not have prosecuted the subsequent action against the master.

*John T. Wilkinson, Jr.*

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[28]The case of Betcher v. McChesney, 255 Pa. 394, 100 Atl. 124 (1917), cited *supra* note 15, was cited by Judge Griffith in support of the decision in the instant case. Just what the holding is in this case is not clear. The servant, while acting within the scope of his employment, operated his automobile in a negligent manner, and injured the plaintiff. The plaintiff recovered a judgment against the servant, and remaining unsatisfied, brought a subsequent action against the master who was vicariously liable. The master made an offer which stated that the damages which had been recovered against the servant in the former suit should be conclusive as to the maximum amount of liability of the master in the subsequent action. The offer was rejected in the trial court, but was admitted upon assignment of error in the Supreme Court. The admission of the offer seems to indicate that the former recovery of the judgment is not a bar to the subsequent pursuit of the inconsistent remedy. On the other hand it appears that the court invokes the doctrine of "election of remedies," which seems to be inconsistent with the admission of the offer. It was said: ". . . the law gives the right of election; the party may sue either master or servant, the one for actual negligence, the other for imputed negligence; but it by no means follows that, if he sue the one and obtain judgment, he can afterwards sue the other on the ground that he had not realized on the judgment obtained." *See* 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 469.

[29]The liability of a surety is conditioned upon that of the principal. A judgment which is obtained against the principal is, therefore, conclusive as to the maximum liability of the surety, just as a judgment in favor of the principal is usually conclusive in favor of the surety. 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 466. Freeman says that these results are not based upon either the principle of *res judicata* or estoppel. Since the surety's liability is merely incidental to that of the principal, if a verdict is given in favor of the principal, it negatives all liability on the part of the surety. McConnell v. Poor, 113 Iowa 133, 84 N. W. 968, 52 L. R. A. 312 (1901).

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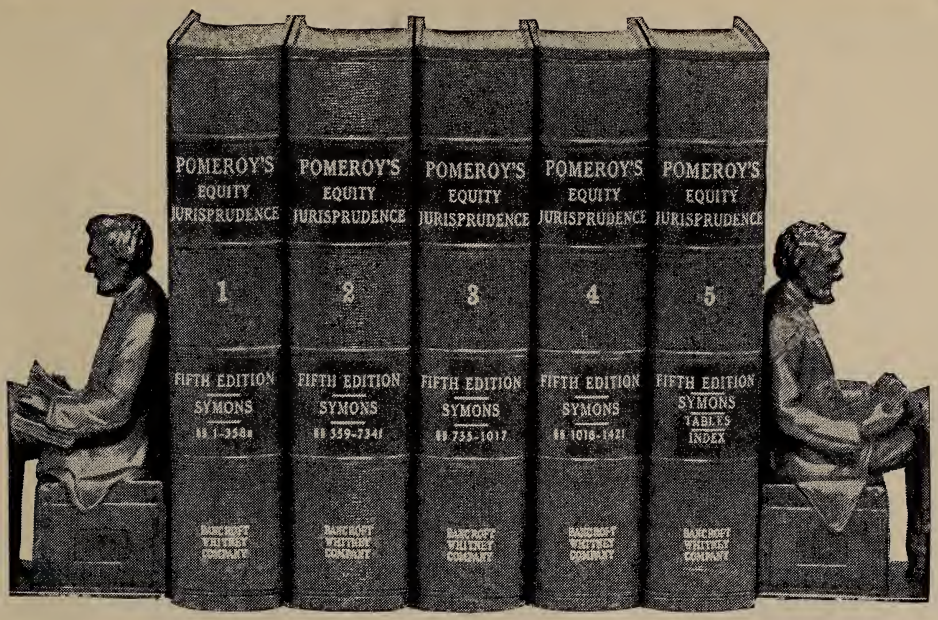


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